Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

WARDE H. ERWIN propria persona,

Petitioner

v.

THE STATE OF OREGON by and through THE HONORABLE JOHN KITZHABER, Governor of the State of Oregon, THE OREGON STATE BAR and its BOARD OF GOVERNORS

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED FOR REVIEW

1) Has the Court of Appeals for the Ninth Circuit decided an important federal question in a way that conflicts with relevant decisions of this court? *Verizon v. Public Service Commission of Maryland*, 535 U.S. _____, May 20, 2002 and *Ex Parte Young*, 209 U.S.123 (1908).

2) Has the Court of Appeals by affirming the decision of the District Court which dismissed the Plaintiff's complaint without hearing for lack of subject matter jurisdiction thereby violated the provisions of the United States Constitution when the complaint requested only a declaratory judgment concerning the operation and enforcement of the Oregon State Bar Lawyer's Professional Liability Fund as affecting the members of the Oregon State Bar being automatically disbarred and prevented from practicing their profession for failure to pay an assessment levied by the Board of Governors without right to a hearing (Oregon State Bar Lawyer's Bar Professional Liability Fund, O.R.S. 9.080 and O.R.S. 9.200)?

The Lawyer's Professional Liability Fund law was impliedly repealed y Chapter 752, *Oregon Revised Statutes* in 1987, but the Bar is enforcing the repealed Fund law. (The Professional Liability Fund's law 1987, Chapter 752 *Oregon Revised Statutes* was the repealing statute.)

3) Has the Court of Appeals for the Ninth Circuit, by affirmance of a District Court dismissal for breach of subject-matter jurisdiction failed to apply the mandate of Title 28, Section 2201 U.S.C.A. which requires the entry of a declaration whether favorable or otherwise? *Advance Resorts of America v. City of Wheeler*, 141 Or. App.166,180, 917 P.2d 61, *rev. den.* 3224 Or. 211 (1996) and *City of Portland v. Cook*, 170 Or. 245, 253, 12 P.3rd 70 (2000).

4) Are the constitutional rights of Oregon lawyers (members of the integrated Oregon State Bar) practicing their profession in the State of Oregon being constitutionally (Federal) discriminated against by being subjected to the only plan of mandatory malpractice insurance adopted by

any state of the Union, all other states examining the same or similar plans having rejected the same?

5) Under what authority may a federal Court of Appeals merely affirm a Federal District Court of a declaratory judgment cause and then order that the decision may not be published?

a) Does the Bar and public have a right to be informed?

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BASIS OF JURISDICTION

This case is brought under authority of Title 28 , Section 2201 UNITED STATES CODE (App. page 5)
Date of document to be reviewed: July 30, 2002
Date and terms of extension of time: November 27, 2002
Statutory provision conferring jurisdiction on Supreme Court:
Title 28, Sections 2201 -2202 United States Code

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STATEMENT OF THE CASE

The only question before this court is :

"Subject matter jurisdiction."

The subject matter of plaintiff's complaint was stated under the heading of jurisdiction as follows:

> This action is based upon Title 28 U.S.C. 2201 (Declaratory Judgment) and presents a question of the validity of legislation by the Oregon State Legislature under Amendments V and XIV of the CONSTITUTION OF THE UNITED STATES OF AMERICA, as affecting the plaintiff and all members of the Oregon State Bar as a class in their relation to the defendants in the administration of the Oregon State Bar Professional Liability Fund.

The United States District Court for the State of Oregon dismissed plaintiff's complaint although it was clearly a "Declaratory" procedure to determine the rights, duties, and relationship between the members of the Oregon State Bar and the Oregon State Bar as an entity together with the Bar's Board of Governors (as its statutory Executive Administrator) in regard to the Bar's administration of The Oregon State Bar Professional Liability Fund and failed to enter a declaration as required. It totally ignored O.R.S. Chapter 752 without even mention, and failed to determine plaintiff's motion for summary judgment based upon the Supreme Court Case of *Verizon Maryland v. Public Service Commission of Maryland et al*, 535 U.S. ____ May 20, 2002 .

ARGUMENT

Reasons for the writ- Considerations concerning review:

Plaintiff filed in the Federal District for the State of Oregon a Complaint and did so in behalf of all the members of the Oregon State Bar as a class as well as personally as a member of the class on the 6th day of February 2001.

Under the heading "Jurisdiction" the complaint stated:

> This action is based upon Title 28 U.S.C. 2201 (declaratory judgment)and presents a question of the validity of legislation by the Oregon State Legislature under amendments V and XIV of the Constitution of the United States as affecting the plaintiff and all members of the Oregon State Bar as a class in their relation to the defendants in the administration of the "Oregon State Bar Professional Liability Fund." (Title 28,# 2201and 2202. (App. page 32).

The Federal District Court dismissed the case without hearing (although hearing was requested) and without making a declaration of any kind as follows:

> " Civil No. 01-177 FR
> JUDGMENT
>
> IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against the plaintiff.
>
> Dated this 23rd day of July 2001.
> (sig) Helen J. Frey
> United States District Judge"

an order dated the same date stated:

"Civil No. 01-177 FR.
ORDER

IT IS HEREBY ORDERED that:

1) defendant Oregon State Bar's motion for summary judgment (#13) is GRANTED
2) defendant State of Oregon's motion to dismiss (#17) is GRANTED.
3) plaintiff's motion for hearing to present evidence (#28)is DENIED, and
4) Plaintiff's motion to strike (#32) is DENIED.

Dated this 23rd day of July 2001.
(sig)) Helen J. Frey
United States District Judge"

The numbers in brackets refer to the District Court Civil Docket. (App. page 33).

An opinion of the Federal District Court was filed on the same date as the Order (see App. page 40) Docket (#34).

The opinion made an analysis of the contentions made in support of defendants' motion to dismiss for lack of subject matter jurisdiction. The contentions were three in number.:

1) The Federal Court lacks subject matter jurisdiction because Erwin's petition is barred by the Eleventh Amendment of the United States Constitution.
2) Issue and claims preclusion and the Rooker-Feldman Doctrine prevented the plaintiff from bringing an action in the Federal District Court because a similar action in the State court of Oregon found:

> 6 The suspension provision of O.R.S. 9.200 for non-payment of P.L.F. assessments is not violative of constitutional 'due process' requirements

> as alleged in Count 3 of plaintiff's second amended complaint.
>
> The suspension provision of ORS 9.200 is not an unconstitutional "taking" of property without compensation.
>
> 8- O.R.S. 9.080 and O.R.S 9.200 do not constitute an unlawful or unconstitutional delegation of legislative authority.

The opinion stated:

> To the extent that Erwin seeks to appeal to this court from the state Court action such an appeal is not proper and is barred by Rooker-Feldman doctrine which bars the lower Federal court from exercising appellate jurisdiction over a state court action even when the challenge involves Federal Constitutional issues. See *Worldwide Church of God v McNair*, 805 F.2d 888, 890-91 (9th Circ. 1986).

Not a single one of the foregoing were proper findings of fact. Each was a pure conclusion of law.

The Plaintiff appealed the judgment of the District Court to the Court of Appeals for the Ninth Circuit (See Court of Appeals Docket App. page 51).

The mistaken action of the District Court as well as the Court of Appeals was the apparent inability to distinguish between a claim for damages and a petition for declaratory judgment, pointing out that the defendants and the court in order to avoid the necessity of preparing and entering a Declaration of Rights between the parties had falsified the allegations of plaintiff's complaint to state that plaintiff sought damages (an absolute falsehood) but labeled by the court as being " unpersuasive") (see MEMORANDUM App. page 82).

Plaintiff had never at any time directly or indirectly requested a claim for damages . He sought nothing but a declaration of rights in any and all proceedings in any and all courts and had pointed out that dismissal of a declaratory judgment proceeding was an impermissible determination and was a nullity in fact. The Court of Appeals has apparently merely affirmed the District Court decision.

Both courts have apparently and intentionally refused to consider the effect that a subsequently adopted statute would have on the statute under which the bar was operating as to the rights of the 10000 plus members of the Oregon State Bar and merely ignored the problem without comment. (O.R.S. Chapter 752 (1983) as affecting O.R.S. 9.080 and O.R.S. 9.200)(1977).

The cases cited to the Court as to the propriety of a "Dismissal" as determining a declaratory judgment proceeding were as follows:

A proceeding for a declaratory judgment is not a "claim," and the parties are not considered "adversary."

> When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against defendant, instead he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and defendant – accordingly regardless of the outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action." *O'Conner v. Zelden*,134 Or. App.444-447, 895 P.2d 809, (1995).

> Since the complaint stated a justiciable controversy, the demurrers should have been overruled and after filing an answer – a decree containing a declaration of rights should have been entered." *Cabel v. Cottage Grove, et al*, 170 Or. 256, 262, 130 P.2d 1013 (1943).

A claim for declaratory judgment may be dismissed only if there is no justiciable controversy." *Johnson v. Miller*, 113 Or. App. 98, 100, 831 P.2d 71 (1992); *Reynolds v. State Board*, 80 Or. App. 428 ,441-42: 722 P.2d 739 (1986).

"If there is a justiciable controversy, the court MUST dispose of the matter by a judgment containing a declaration as to the matter in dispute." *Advance Resorts of America v. The City of Wheeler*, 141 Or. App. 166,180; 917 P.2d 61 (1996).

_ - — action for declaratory judgment must not be dismissed for failure to state a cause or claim; if complaint presents justiciable controversy, motion to dismiss should be denied." *Clark v. City of Albany*, 142 Or. App. 207; 921 P.2d 1094 (1997).

Dismissal of Claim for Declaratory Judgment is inappropriate where claim presents "justiciable controversy." *Randolph v. State by and through Oregon Dept. of Corrections*, 139 Or. App. 79, 910 P.2d 1171, (1996).

The proper disposition of declaratory relief claims is not to dismiss them but to declare the parties' rights." *Sims v. Belshaw Café*, 165 Or. App.180, 997 P.2d 201 (2000).

However, Plaintiff contended that all of the findings and conclusions were erroneous not only as contended by Plaintiff's briefs but as determined by the Supreme Court of the United States on May 20, 2002 in the case of *Verizon Maryland v. Public Service Commission* (herein *Verizon*) because that case discussed precisely the fact that the Courts had been misinterpreting the exact same law as the Federal District Court and the Court of Appeals had done in this case holding that the District Court did not have subject matter

jurisdiction of a case brought under Title 28, Section 2201 and 2202 U.S.C. (App. page 32).

On the day following the *Verizon* determination a full copy of the decision was forwarded to the Ninth Circuit (May 21, 2002), (App. page 70) (Served on May 21 but filed on May 28, 2002.) The filing was accompanied by a letter designating *Verizon* as "Additional authority . . ." (App. page 70)

After reviewing the reported case of *Verizon* more thoroughly, plaintiff became convinced that all three of the District Court theories upon which it relied for its conclusion that it did not have subject matter jurisdiction had been effectively overruled by *Verizon*, and Plaintiff prepared, served, and filed a motion for summary judgment requesting a remand and for a hearing on the merits. (See App. page 51) and Docket Sheet of the Ninth Circuit court as having been served on July 26, 2002 and filed on July 29, 2002.

No action was or has been taken either as to the additional authority or the Motion for Summary Judgment.

Apparently it was determined that the Plaintiff was correct in his assumption that the *Verizon* case and the *Young* case had conclusively emasculated all three theories upon which the District Court had relied for support of its conclusion that it did not have subject matter jurisdiction of Plaintiff's case and on the contrary did determine that the District Court did in fact have subject matter jurisdiction.

On or about the 2nd day of August, Plaintiff received a copy of a MEMORANDUM upon which appeared both a single and a double asterisk, the former of which advised that F.R.A.P. Rule 36-3 provided that the Memorandum may not be cited as authority. (App. page 82), and the latter of which advised that the panel had unanimously found that the case was suitable for determination without oral argument. The double asterisk footnote referenced F.R.A.P. Rule 36-3 which states as follows:

CIRCUIT RULE 36-3. CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS

(a) Not precedent. Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata and collateral estoppel.

(b) Citation. Unpublished dispositions and orders of this court may not be cited to or by the courts of this Circuit except in the following circumstances.

(i) They may be cited to this court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this court or by any other courts in this circuit for factual purposes such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorney's fees, or the existence of a related case.

(iii) They may be cited to this court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4 or in a petition for panel rehearing or rehearing en banc in order to demonstrate the existence of a conflict among opinions, dispositions or orders.

(c) Attach copy. A copy of any unpublished disposition or order must be attached to the document.

CIRCUIT ADVISORY COMMITTEE
NOTE TO RULE 36-3

Circuit Rule 36-3 has been adopted for a limited 30-month period, beginning July 1, 2000 and ending December 31, 2002. Litigants are invited to submit comments regarding the rule to the clerk during the first 24 months of the trial period. After the rule has been in effect for 24 months, the Advisory Committee on Rules will study and report to the Court on the frequency with which unpublished dispositions are cited to the court and on any problems or concerns associated with this rule. The Advisory Committee will also issue a recommendation on whether the rule should be made permanent. Unless, by December 31, 2002, the court votes affirmatively to extend the rule, it will automatically expire on December 31, 2002, and the former version of Circuit Rule 36-3 prohibiting citations under all circumstances will be reinstated. (New Rule 7/1/2000). Adopted effective July 1, 2000.

A letter disposition of a "judgment" was apparently sent to the District Court Clerk but there was no "JUDGMENT"entered insofar as plaintiff was informed. Plaintiff's motion for summary judgment was still pending before the motion panel.

The decision of a merit panel appointed without notice stated: "Erwin's contentions regarding a 'manufactured' theory between the District court and defendant and the existence of a 'justiciable controversy are "unpersuasive."

The "manufactured" theory refers to the absolutely false premise created by defendants and "parroted" by the court that Erwin's complaint sought a money judgment. The justiciable controversy was admitted by defendants. Each was an absolute fact and "persuasion" of the court was not

sought. It would seem apparent that the courts have determined that in the event that they face an absolutely incontrovertible proposition of law, the way to prevent having to determine the presented matter is to totally ignore its existence thereby preventing an appeal.

On the 23rd day of September, 2002, Plaintiff wrote to the Ninth Circuit Court clerk and served the parties with a copy in which the convoluted procedure had placed the Plaintiff in a difficult position and that any judgment, if any had ever been issued, should be published since it involves well over 10000 Oregon lawyers, all citizens of the United States. (see copy App. page 55).

No response!

ERWIN and *VERIZON* COMPARED SUBJECT MATTER JURISDICTION

As hereinabove stated, the only question before this court is "subject matter jurisdiction."

The U.S. District Court for the District of Oregon dismissed plaintiff's complaint which requested a declaratory judgment determining the rights, duties, and relationship of the members of the Oregon State Bar and the Oregon State Bar as an entity and its Board of governors as its statutory administrator in regard to the Bar's Administration of "THE OREGON STATE BAR PROFESSIONAL LIABILITY FUND" as affected by the United States Constitution.

The rights, duties, and obligations concerning which the Plaintiff personally and in behalf of the more than ten thousand lawyers engaged in the private practice of law in the state of Oregon involved only the provisions of the Federal Declaration of Judgments Act (Title 28, Sections 2201 and 2202). The complaint was limited to the claimed violations by the defendant Bar of the protections provided by the terms of the Fifth and Fourteenth amendments to the Constitution of the United States of America.

The District Court's dismissal did not discuss and in fact refused to hear or determine the merits of Plaintiff's claim either as to law or facts.

The dismissal was based entirely on the verbatim adoption of defendants' motions to dismiss and for summary judgment. The motions to dismiss were based upon "lack of subject matter jurisdiction." (App. page 46-47).

The "subject matter jurisdiction" claimed to be lacking was based entirely on three procedural theories none of which had anything to do with the subject matter of plaintiff's complaint.

The theories were:

1) The complaint was in effect an appeal from a lower court decision and was prevented by the Rooker-Feldman Doctrine.

2) The complaint was a claim for damages prevented by the Eleventh Amendment to the United States Constitution which prevented actions by a citizen of state against a state of the United States.

3) The complaint claim was prevented by the Doctrine of "claims preclusion."

The subject matter of Plaintiff's complaint was under the heading of "JURISDICTION" as follows:

> This action is based upon Title 28, Section 2201U.S.C. (Declaratory Judgment) and presents a question of the validity of legislation by the Oregon State Legislature under amendments V and XIV of the Constitution of the United States of America as affecting the plaintiff and all members of the Oregon State Bar as a class in their relation to the defendants in the administration of "The Oregon State Bar Professional Liability Fund."

In connection with their motions to dismiss, the defendants manufactured a totally false theory that Plaintiff was asserting a claim for damages against the defendants

and so advised the court who accepted that false statement as though true.

The representation to the court was a total fabrication and 100% untrue. But it was apparently accepted by the Court of Appeals since the panel characterized the falsity as "unpersuasive," thereby accepting its falsity. (See Memorandum App. page 82).

The Memorandum, the affirmance, the whatever else except not a "judgment" merely affirmed the decision of the District Court although there was no valid judgment of that court to affirm the so-called judgment stating as follows:

> "IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against the plaintiff.
>
> "DATED this 23 day of July, 2001.
> (sig) Helen J. Frye
> United States District Judge"

That is all that the Court of Appeals therefor affirmed. There being no Declaration and no Dismissal.

On May 20, 2002 the answer seemed to be providentially provided by the Supreme Court of the U.S. in deciding the case of *Verizon Maryland v. Public Service Commission of Maryland, et. al.* on writs of Certiorari to Fourth Circuit Court of Appeals. The decision stated the questions presented as follows:

> "These cases present the question of whether or not the Federal Courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet service providers violates Federal Law."

Verizon negotiated an agreement with competitors including M.C.I. "WorldCom." The Maryland Service

Committee affirmed the agreement. Verizon notified MCI that it would no longer pay reciprocal compensation for certain calls made by Verizon customers to the local access numbers of internet service providers including WorldCom.

WorldCom filed a complaint with the commission which found in favor of WorldCom. Verizon filed a new complaint with the Commission as a result of an F CC ruling restating Verizon's position. The Commission rejected Verizon's consternation and Verizon then filed an action in the Federal District Court for Maryland citing 47 U.S.C. 252 (e) (6) and 28 U.S.C. 1331 as a basis for jurisdiction, naming the commission, its members in their official capacities, World Com, and other competing LECs seeking declaratory and injunctive relief from the commission's order that Verizon must pay reciprocal compensation to WorldCom.

The District Court of Maryland dismissed the action and a divided panel of the Court of Appeals for the Fourth Cir. D.C. affirmed 240 F.3rd279 (2001). 4th Circ. D.C. held that the commission had not waived immunity (11th amendment) and that *ex parte Young* 209 U.S. 123 (1908) does not permit suit against individuals in their official capacities.

Fourth Circ. D.C. then held that neither 47 U.S.C. (e) (6) nor 28 U.S.C. 1331 provided a basis for jurisdiction over Verizon's claims against the private defendants.

Both Verizon and the United States (an intervener) petitioned the U.S. Supreme Court for review of the four questions resolved by 4th Circ. DC.

The Supreme Court granted certiorari on the remaining three questions. (534 U.S. 1072) (2001).

WorldCom, Verizon, and the U.S. contended that 47 U.S.C. 252 (e) (6) and 28 U.S.C.1331 independently granted federal courts subject matter jurisdiction to determine whether the Commission's order requiring the Verizon pay WorldCom reciprocal compensation for I.S.P. bound calls violated the 1996 act.

The Supreme Court agreed that even if Section 252 (e)(6) does not "confer" jurisdiction, it at least does not "divest" the

District Courts of their authority under 28 U.S.C.1331. (App. page 60)

28 U.S.C. 1331 provides:

> "FEDERAL QUESTION
> The District Courts shall have original jurisdiction of all civil actions arising under the constitution laws or treaties of the United States".

The principal purpose of the grant of original federal question jurisdiction is to afford plaintiffs a sympathetic and knowledgeable forum for vindication of their Federal rights. *Hunter v. United Van Lines* 746 F.2d 635 C.A.9 (Cal.) 1984, *cert.den., Rec'd den.* 106 S.Ct. 180.

Verizon's District Court complaint alleged that the commission violated the act when it ordered payment to reciprocal compensation and sought a declaratory judgment that the commission's order was unlawful and an injunction prohibiting its enforcement.

In its *Verizon* determination, the Supreme Court held (App. page 61): "It is firmly established in our cases that the absence of valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction i.e. the court's statutory or constitutional power to adjudicate the case." *Steel Co. v Citizens for better Environment,* 528 U.S. 83-89 (1998).

> As we have said, the District Court has jurisdiction if the right of the petitioner to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or when such a claim is wholly insubstantial and

> frivolous. Verizon's claim thus falls within 28 U.S.C. 1331's general grant of jurisdiction and contrary to the Fourth Circuit's conclusions nothing in 47 U.S.C. 252 (e) (6) purports to strip its jurisdiction. (App. page 61)

The Supreme Court used the words "precisely parallel." The identical matter is "precisely parallel" to the present case since Title 28 sections 2201 and 2202 does not purport to strip the District Court jurisdiction and in fact specifically grants jurisdiction.

The Supreme Court stated (Opinion page seven): "Indeed it (Section 252) does not even mention subject matter jurisdiction but reads like the conferral of a private cause of action (any party aggrieved by such determination may bring an action in an appropriate Federal District Court)." (App. page 62)

This is precisely parallel to Title 28 Sections 2201 and 2202 language stating "In the case of actual controversy within its jurisdiction– any court of the United States upon filing of an appropriate proceeding may declare the rights and legal relations of any party seeking such declaration." (App. page 62)

The Supreme Court stated (Opinion page eight) in regard to withdrawal of Section 1331 grant of jurisdiction: "We will not presume that the statute means what it neither says nor fairly implies 3." (App. page 63)

The numeral (3) refers to a footnote in which the Supreme Court made it perfectly clear that the Rooker-Feldman Doctrine "has no application to judicial review of executive action including determinations made by a state administrative agency." (App. page 63)

It is clear that the Erwin complaint alleges a Federal constitutional violation by the Oregon State Bar (a state agency).

It is clear that based upon the *Verizon* footnote that the reliance by the court of appeals and the District Court

decision relying on the Rooker-Feldman Doctrine was absolutely in error in the Erwin case.

Plaintiff's complaint sought a declaratory judgment as did Verizon's complaint and sought as "precisely parallel" to footnote three that the relationship between Plaintiff and defendants as to the Oregon State Bar Professional Liability Fund be terminated and abated, and no further assessments be levied or collected unless upon order of the District Court because of a determination that the Bar and its Board of Governors were in violation of the United States Constitution. (Plaintiff's Complaint prayer number 3) (App. page 30).

The Supreme Court in *Verizon* states: "*Verizon* may proceed against the individual commissioners in their official capacities pursuant to the doctrine of *ex parte Young*," 209 U.S.123(1908) and (Opinion page eight): (App. page 66)

> In determining whether the doctrine of *ex parte Young* avoids an eleventh Amendment Bar to suit, a court need only conduct a straight forward inquiry into whether the complaint alleges an ongoing violation of Federal Law and seeks relief properly characterized as prospective." *Idaho v. Coeur d'alene tribe of Idaho*; 521 U.S. 261-296 (1997). (App. page 63)

Note: To make a straight forward inquiry the federal District Court would of necessity have to hold a hearing which the Oregon Federal District Court refused to do.

The *Verizon* case held (Opinion page nine):

> The prayer for injunctive relief (that state officials be restrained from enforcing an order in contravening controlling Federal Law) clearly satisfies our 'straight forward inquiry' and 'indeed *ex parte Young* itself was a suit against state officials – to enjoin enforcement of a railroad commission's order requiring reduction in rates.' 209 U.S. at 129. (App. page 64)

Again referring to "Declaratory Relief" (Opinion page nine), the *Verizon* Court stated:

> As for *Verizon's* prayer for declaratory relief: that to be sure, seeks a declaration of the past as well as the future ineffectiveness of the commission's actions so that the past financial liability of private parties may be affected. But no past liability of the state or any of its commissioners is at issue.
>
> It does not impose upon the State a monetary loss resulting from a past breach of fiduciary duty on the part of the defendant state officials. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Insofar as exposure of the state is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction.

Therefore, Plaintiff concludes that all three of the theories relied upon by both the Oregon District Court and the Ninth Circuit Court of Appeals for support of those decisions have been by virtue of the "precisely parallel" comparison of *Verizon* and its logical examination of the identical questions presented in this Erwin case been emasculated, and the Erwin case should be remanded (as was *Verizon*) with instructions to accept jurisdiction and to hold hearings in order to determine the proper applicability of existing law relating to the administration and validity of the Oregon State Professional Liability Fund.

Respectfully submitted,

Warde H. Erwin, pro per

Supreme Court, U.S.
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APPENDIX

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Petitioner

v.

THE STATE OF OREGON by and through THE HONORABLE JOHN KITZHABER, Governor of the State of Oregon, THE OREGON STATE BAR and its BOARD OF GOVERNORS.

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On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

No. _____
WARDE H. ERWIN, PLAINTIFFS,

v.

THE STATE OF OREGON BY AND THROUGH THE HONORABLE JOHN KITZHABER, GOVERNOR OF THE STATE OF OREGON, THE OREGON STATE BAR AND ITS BOARD OF GOVERNORS AS ITS EXECUTIVE ADMINISTRATOR, AND THE UNKNOWN INSURANCE COMPANY PROVIDING MALFEASANCE INSURANCE, FOR THE OFFICERS, DIRECTORS, AND EMPLOYEES OF THE OREGON STATE BAR, DEFENDANTS

PETITION FOR DECLARATORY JUDGMENT
UNDER TITLE 28, U.S.C. #2201

STATUS OF PARTIES AND JURISDICTION OF COURT

DEFENDANTS

STATE OF OREGON - Defendant

The State of OREGON has been since February 14, 1859, and is now, a unit of the United States of America and is subject to the constitution and laws thereof, and defendant, John Kitzhaber, is the Governor and Chief Executive of the State of Oregon, Article V, Section 1, *Oregon Constitution* and is invested with the Executive Power of the State.

The Governor is mandated to take care that all laws be fully executed (Article Section 10 of the *Oregon Constitution*.

OREGON STATE BAR - Defendant

The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon, and is legislatively created and may sue and be sued (*Oregon Revised Statutes* 9.010). The bar is a legislatively integrated association, and no person may engage in the practice of law unless a member of the Oregon State Bar.

OREGON STATE BAR - Board of Governors

Oregon State Bar is controlled by a Board of Governors which said board administers the affairs of the Oregon State Bar as its executive administrator. The said board is controlled by and is composed of elected members of the integrated bar association together with nonvoting members of public membership.

OREGON LEGAL SYSTEM

The government of the State of Oregon is divided into three branches, the executive, the judicial, and the legislative.

The first is the "legislative"; the second is the "executive"; and the third is the "judicial," each of which is supreme in its own sphere.

The administration of the legal system of the Oregon State judicial department is vested in the state-created trial and appellate courts of which the Supreme Court of the State of Oregon is the ultimate authority. Its Chief Justice is the controlling officer of the judicial system for the administration of the legal system within the State of Oregon. Each judge of any court shall be a member of the Oregon State Bar.

The State Bar is composed exclusively of members who have been examined and approved as to legal competency and have taken and subscribed to an oath to support the constitutions and laws of the United States of America and of the State of Oregon (*Oregon Revised Statutes* 9.180, 9.220).

PLAINTIFF

WARDE H. ERWIN - Bar Number 39011

He is a member in good standing of the Oregon State Bar (9-11-1939) and of the Bar of the United States District Court for the District of Oregon, and is a citizen of the State of Oregon, and the United States of America.

JURISDICTION

This action is based upon Title 28 U.S.C. 2201 (Declaratory Judgment) and presents a question of the validity of legislation by the Oregon State Legislature under Amendments V and XIV of the Constitution of the United States of America, as affecting the plaintiffs and all members of the Oregon State Bar as a class in their relation to the defendants in the administration of the Oregon State Bar Professional Liability Fund.

PLAINTIFF's ALLEGATIONS

1

The State of Oregon by and through its legislative branch of the government did adopt an amendment to *Oregon*

Revised Statutes (ORS herein number 9.080 and ORS 9.200) authorizing the Board of Governors (BOG herein) to establish a Lawyers' Liability as follows:

The Amendment was approved by the Governor of the State of Oregon, and filed with the Secretary of State on July 20, 1977. The Legislature ended on July 5, 1977.

The Amendment states as applicable:

> (2)(a) The board shall have the authority to establish a lawyer's professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible.
>
> The board shall have the authority to assess each active member of the state bar engaged in the private practice of law whose principal office is in Oregon for contributions to such fund, to establish definitions of coverage to be provided by such fund and to retain or employ legal counsel to represent such fund and defend and control the defense against any covered claim made against such member.

The Board of Governors elected to establish a fund and did so by resolution on July 22. 1977 as follows:

EXHIBIT B
RE SOLUTION

WHEREAS, the Board of Governors of the Oregon State Bar is empowered, under the provisions of ORS 9.080, as amended by Chapter 527, Oregon Laws, 1977, to (a) require that each active member of the Oregon State Bar engaged in the private practice of law in Oregon carry professional liability insurance and (b) establish a lawyers' professional liability fund ("Fund") and plan, such Fund to pay, on behalf of members of the Oregon State Bar in the private practice of law in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as the result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney, or caused by any other person for whose acts or omissions the member is legally responsible, subject to the bylaws of the Fund and plan (coverage agreement) to be adopted by the Board of Directors of the Fund and ratified by the Board of Governors of the Oregon State Bar; and

WHEREAS, such statute further provides that the Board of Governors has the authority to assess all attorneys in the private practice of law in Oregon for contributions to such Fund and, pursuant to ORS 9.181, as amended by Chapter 527, Oregon Laws, 1977, the annual membership fees may include any amount assessed under any plan for legal liability coverage; and

WHEREAS, the Board of Governors of the Oregon State Bar considers it in the interest of the citizens of the State of Oregon and of the active members of the Oregon State Bar in the private

practice of law in Oregon to enact and create such Fund and plan and cause such assessments to be made for legal liability coverage:

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Effective July 1, 1978, all active members of the Oregon State Bar engaged in the private practice of law in Oregon shall carry professional liability coverage with aggregate limits of not less than $100,000.

2. Such professional liability coverage for all active members engaged in the private practice of law in Oregon, except patent attorneys, shall be obtained through the Oregon State Bar Professional Liability Fund. Each patent attorney shall Professional Liability Fund be required to furnish evidence, by February 1, 1978, that he or she has or will have in force at least $100,000 of comparable coverage with a private insurance carrier covering the period July 1 to December 31, 1978, and shall be required to furnish evidence, by February I of each year thereafter, of the same coverage for that full year.

3. The Oregon State Bar does hereby establish a fund, to be known as the Oregon State Bar Professional Liability Fund; and its duration shall be perpetual unless and until such Fund shall be dissolved pursuant to law.

4. The Fund shall be under the control of the Board of Governors of the Oregon State Bar, but shall be managed by a Board of Directors appointed by the Board of Governors. The initial Board of Directors shall be appointed by October 1, 1977. The Board of Directors of the Fund shall consist of seven active members of the Oregon State Bar in the private practice of law in Oregon. The term of such Directors

shall be three years, on staggered terms, with the term of two mem- expiring at the conclusion of the 1978 annual meeting of the Oregon State Bar; the terms of two members expiring at the conclusion of the 1979 annual meeting; and the terms of three members expiring at the conclusion of the 1980 annual meeting.

5. The bylaws of the Fund shall be promulgated by the Board of Directors, subject to the approval of the Board of Governors.

6. The Board of Governors shall have authority to vest in the Board of Directors of the Fund such authority, as is necessary or convenient to carry out the provisions of ORS 9.080 relative to the requirement that all active members carry professional liability coverage, establish and manage the Fund to provide such coverage and recommend to the Board of Governors amounts active members shall be assessed for participation therein.

7. As a contribution to the Fund, the Board of Governors shall assess each active member of the Oregon State Bar in the private practice of law in Oregon as part of his or her annual membership fee, or otherwise pursuant to law. For the year 1978, for professional liability coverage from July 1, 1978 through December 31, 1978, the assessment shall be $250, to be paid with and as a part of the annual membership fee. Any member admitted to practice in Oregon after September 1, 1977 shall be assessed one-half the assessment for 1978. Any member entering the private practice of law in Oregon between July 1, 1978 and December 31, 1978, but admitted in Oregon prior to September 1, 1977, shall be assessed a prorata portion of the 1978 assessment. Members of the bar in the practice of law in Oregon for whom. annual membership fees are waived shall, nevertheless, be subject to assessment for pro-

fessional liability coverage under the provisions of this resolution.

8. All active members of the Oregon State Bar in the private practice of law in Oregon shall, prior to November 1, 1977, complete and return a claims information form to be transmitted by the Board Of Directors of the Fund.

9. The assessments for the Fund for 1978 shall be included in the 1978 membership fee resolution submitted to the membership of the Bar at the 1977 annual meeting.

10. The Oregon State Bar shall lend such sums to the Fund as necessary for or organizational expenses to be repaid by the Fund.

3

The Board of Governors chose to enforce the collection of monetary assessments to be levied against the members of the Oregon State Bar in order to finance the Professional Liability Fund by suspending and withdrawing the right of any member to engage in the practice of law automatically and without hearing upon the failure to pay any such assessment so levied and to automatically deprive the member of the right to vote (Subparagraph two of ORS 9.200).

The legislative amendment provided:

9.200 Effect of failure to pay membership fees; reinstatement. (1) Any member in default in payment of membership fees established under ORS 9.191(1) for a period of 90 days, or any person in default in payment of membership fees established under ORS 9.191(2) for a period of 30 days after admission or as otherwise provided by the board, or any member in default in payment of assessed contributions to a professional liability fund under ORS 9.080(2) for a period of 30 days, shall, after 60 days' written notice of the delinquency, be

suspended from membership in the bar. The notice of delinquency shall be sent by the executive director, by registered or certified mail, to the member in default at the last-known post-office address of the member. Failure to pay the fees or contributions within 60 days after the date of the deposit of the notice in the post office shall automatically suspend the delinquent member. The names of all members suspended from membership for nonpayment of fees or contributions shall be certified by the executive director to the State Court Administrator and to each of the judges of the Court of Appeals, circuit and tax courts of the state.

(2) An active member delinquent in the payment of such fees or contributions shall not be entitled to vote.

(3) A member suspended for delinquency in payment of such fees or contributions shall be reinstated only on compliance with the rules of the Supreme Court and the rules of procedure and payment of all required fees or contributions. [Amended by 1957 c.271 §1; 1961 c.499 §2, subsection (2) formerly part or 9.190; 1970 c.508 §41].

Plaintiff contends that the following provisions of the Constitution of the United States have been violated by the adoption and implementation of the foregoing Oregon Legislative actions as administered by the Oregon State Bar by and through its executive administrator, the Board of Governors of the Oregon State Bar.

A. The abridging of privileges and immunities of Amendment XIV;

B. & C. The due process provisions of Amendment V and XIV;

D. The equal protection of laws and immunities of Amendment XIV;

E. Taking of private property for public use without just

compensation; (Amend. V)

Each will be alleged with more particularity.

AMENDMENT V

When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [Proposed by Congress in 1978 and ratified by the necessary number of states in 1791.]

AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5

Four A and four D of paragraph four grant privileges to all citizens of the United States of which a citizen may not be deprived by anyone (person or entity or government).

6

Four B of paragraph four is both a privilege and right.

As the necessity to characterize each the case of *Schware v. Board of Examiners*, 353 U.S. 239, footnote five as to the characterization of "the practice of law" is clearly stated.

Not only is a state prevented from depriving a citizen of the United States from practicing the profession of law by Amendment XIV, but so is everyone and anyone by Amendment V.

7

Four B and four C of paragraph four mandates and is directed solely and precisely and positively to the states of the United States of which Oregon is one — Amendment XIV.

8

The federal constitution and restrictions are both direct and indirect. The provisions of Amendment XIV are "mandates" to state governments. The provisions of Amendment V are directed to the personal protection of every citizen of the United States of America.

9

NO STATE SHALL

The federal constitution by Amendment XIV directly forbids a state to:

MAKE OR ENFORCE

any law which shall abridge privileges or immunities of citizens of the United States.

NOR DEPRIVE ANY PERSON

of life, liberty, or property without due process of law.

NCR

DENY ANY PERSON

the equal protection of the laws.

The Legislature of the State of Oregon has deliberately violated each of said federal constitutional provisions in regard to the establishment of a Professional Liability Fund and its enforcement by levying monetary assessments against each member of the Bar and enforcing and compelling payment of said assessment by withdrawing each member's right to practice the profession of law in the event of failure to pay any such assessment.

NO PERSON SHALL

The federal constitution by Amendment V forbids the taking of any private property by anyone (governmental, individual, or entity) in any manner. It provides that no person shall:

BE DEPRIVED

of life, liberty, or property without due process of law.

NOR A PERSONS'

private property be taken for public purpose without just compensation.

10

The withdrawal of the right to practice the profession of law is both compulsory and automatic, without hearing or process of any kind or sort. (See paragraph three herein).

11

Particularization of items set forth in paragraph four follow in alphabetical sequence (4A, 4B, 4C, 4D, and 4E):

"A"

ABRIDGING OF PRIVILEGE AND IMMUNITIES OF CITIZENS OF THE UNITED STATES IN THE STATE OF OREGON

Amendment XIV (Federal) (See paragraph four above) states:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . "

Webster's Dictionary states as applicable to the foregoing use of the word "abridge":

"to lessen or curtail rights, authorities, etc."

The State of Oregon is the only state in the United States which has adopted a mandatory Professional Liability Fund as a condition to the right to practice a profession to be financed by monetary levy and assessment and to be enforced by automatic suspension of the right to practice the profession exclusively because of the failure to pay an assessment.

The Supreme Court of the United States of America has defined one of the privileges granted to citizens of the United States in the case of *Schware v. Board of Examiners*, 353 U.S. 232, 239, (1957). It states:

> "A state can not exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection of the Fourteenth Amendment."

Footnote 5, page 239, following the statement:
It states:

> We need not enter into a discussion whether the practice of law is a "right" or a "privilege." Regardless of how the state's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person can not be prevented from practicing except for valid reasons, certainly the practice of law is not a matter of State's grace, *ex parte Garland v. Wall*, 333-339.

Does the action of the State of Oregon in administering and enforcing monetary levies and assessments to support a Lawyer's legal liability fund constitute an "abridgement" of

the rights and privileges protected by the United States Constitution, Amendment XIV?

It violates "due process" since "suspension from practice" is automatic and totally prevents appeal, and clearly violates "equal protection" in that the state has adopted (but not enforced) Chapter 752, *Oregon Revised Statutes* providing an entirely different mechanism for other professions but also including the profession of law which is additionally controlled by ORS 9.080 and ORS 9.200 covering the same subject.

It violates the prohibition against taking property for public purposes without compensation and all of those prohibitions also constitute privileges if violated.

"Abridgement" is complete upon any action which lessens the privilege in any degree.

"B" and "C"

Amendment XIV states:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law." (See paragraph four in full)

Plaintiff alleges that the State of Oregon and the Oregon State Bar and its Board of Governors as instrumentalities of the judicial department of the government of the State of Oregon adopted legislation depriving plaintiff of a property right (to practice the profession of law) without providing and indeed preventing the due process of law in violation of the restrictions of both Amendments V and XIV.

Suspension from membership in the Oregon State Bar deprives members of the Bar of the right to practice the profession of law upon failure to pay an assessment levied to support and maintain the Professional Liability Fund.

Oregon has an integrated bar and suspension automatically deprives a lawyer of the right to practice.

"Suspension" was and is automatic. No appeals are permitted nor is any hearing scheduled or permitted.

The State of Oregon is the only state in the United States of America which has adopted the same or any similar provision.

"D"

EQUAL PROTECTION OF LAW
AMENDMENT XIV (FEDERAL)

Amendment XIV of the United States of America Constitution provides in part and as applicable to this allegation of plaintiffs as follows:

> ". . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." (In full paragraph 5)

Plaintiff alleges that the State of Oregon through its legislative branch and through its judicial branch has denied and is denying plaintiff and all members of the Oregon State Bar as a class the equal protection of the laws in the following manner:

Article I, Section 20 of the Oregon Constitution provides an identical provision in respect to the adoption of 'any law' by the Oregon legislature. It reiterates the prohibition by which the United States Constitution provides that "no state" shall deny equal protection while the state constitution provides that "no law" shall be passed by the Oregon legislature which

> ". . . grants to any citizen or class of citizens any privileges or immunities which upon the same terms shall not equally belong to all citizens . . ."

In addition, the Oregon Constitution provides that the power to legislate is confined by its Article I, Section 21, to the legislative branch of the state and may not be delegated under the separation of power of state government of Oregon.

It states (as applicable):

> "nor shall any law be passed, the taking effect of which shall be made to depend on any authority . . ."

Plaintiff contends that the Oregon Legislature violated both federal and state constitutions by delegating legislative authority to the Oregon State Bar through the Oregon State Bar Board of Governors the authority to establish at its choice (1) a program of mandatory malpractice insurance requiring that all members of the Oregon State Bar carry malpractice insurance and (2) to establish a professional liability fund to which all members of the integrated Oregon State Bar could be required to contribute by monetary assessment and levy (*OREGON REVISED STATUTES* 9.080, 9.200).

Plaintiff contends that the Oregon State Bar through its Board of Governors violated both constitutions by subdelegating whatever authority had been granted to it by the legislative amendments of ORS 9.080, 9.191, and 9.200 to a self-appointed nonentity to perform whatever it (BOG) was authorized to perform by the legislative amendments to ORS 9.080, 9.191, and 9.200 or as the creation and enforcement of a plan for creation of a "fund."

The self-appointed nonentity was to be known as the Board of Directors of the Oregon State Bar Professional Liability Fund. (Article 15 of the Bylaws of Oregon State Bar (OSB))

NOTE: The terminology ascribed to the nonentity subnominated and so created indicates that the nonentity so created was not authorized to create a mandatory liability insurance program but only to create "a fund" as limited and as authorized by the amendment to ORS 9.080, 9.191, and 9.200 by the legislature even though the resolution (fund creation) as well as the amendments ORS 9.080 was prefaced by the conjunctive "and."

Subdelegation of legislative authority is not permitted by

Oregon law, but the Board of Directors created and adopted a plan for creation of a fund and its operation and enforcement of assessment for supporting monetary levies as approved by the Board of Governors of the Oregon State Bar (BOG). Copies were disseminated to the members of the Oregon State Bar which levied monetary assessments and suspended members of the integrated Bar Association for nonpayment of assessments automatically based thereon.

In doing so, BOG also violated the provisions of Article V, Section 28, of the Oregon Constitution, which provides that legislation shall not become valid until 90 days following the adjournment of the legislature. The "Fund" was to be limited to reimbursement of and to a lawyer only after his liability was legally determined.

The amendment in question was adopted and included by BOG resolution fifteen (15) days following the adjournment of the 1977 legislature on July 5, 1977.

The adopted amendment was not in effect at the date the legislative amendment was adopted as the basis of the bar's authority to establish a Professional Liability Fund. The Bar's resolution of July 24, 1977 was void. (Paragraph two)

Article IV, Section 28 Oregon Constitution states as follows:

> "Section 28. When Act Takes Effect. No act shall take effect, until ninety days from the end of the session, at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble, or in the body of the law."

The members of the Oregon State Bar were therefore deprived of the privilege of equal protection of law by adopting and enforcing an invalid restriction on the activities of bar members.

At the legislative assembly in 1975, the legislature adopted *Oregon Revised Statutes*, Chapter 752, as well as 9.080.

Chapter 752 ORS as adopted by the 1975 legislature pertained solely to the medical profession. ORS 9.080 pertained to the legal profession.

The authority of ORS 9.080 as adopted in 1975, was never implemented because of serious opposition, and several other options were offered by proposed amendment. Toward the end of the session, two years later (1977) as a compromise, the authority to adopt "a plan" to be known as "The Oregon State Bar Professional Liability Fund" was tacked on to the mandatory malpractice insurance provision adopted two years earlier by amending of ORS 9.080 adopted in 1975. The Bar Board of Governors determined to construe the addition of a Fund as a choice, and on July 22, 1977, opted for creation of a plan by resolution.

Chapter 752 ORS as applicable only to the medical profession continued in existence until the legislative session of the Oregon Legislature in 1987, at which time it was amended and adopted as the "Oregon Professional Liability Fund's Law."

As amended in 1987, it applied to all professions licensed in the State of Oregon.

It provided that a determination as to whether or not professional liability insurance was available at reasonable rates for each profession was to be determined at public expense by Oregon State Department of Business and Consumer Services and to establish a fund to provide such coverage for members of all professions by creation of separate agreement.

The 1977 amended provisions of ORS 9.080, 9.191, and 9 9.200 were not amended leaving the members of the legal profession subject to its own mandatory fund.

ORS 752.055 provides as follows:

"752.055 Short title, ORS 752.005 to 752.055. shall be known and may be cited as 'The Oregon Professional Liability Funds Law.' (1987 c.774 #93b)"

When the legislature or any other governmental authority at the State level authorizes another department to create and enforce a legislative provision for the alleged protection of "the public" rather than to adopt an enactment complete in itself with administration only delegated to a nonlegislative authority, the Oregon and US constitutions are violated because the subject matter does not then "equally belong to all citizens" and "equal protection" is denied. *Oregon Constitution* - Article III.

Section 1. Separation of powers. The powers of government shall be divided into three separate (sic) departments, the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

"E"

THE TAKING FOR PUBLIC USE-COMPENSATION AMENDMENT V (FEDERAL)

Prevents taking of private property for public use without just compensation.

As applicable, Amendment V to the Constitution of the United States of America, states:

"... nor shall private property be taken for public use, without just compensation."

The right to practice the profession of law constitutes private property rights belonging to the members of the

integrated bar in the State of Oregon. No person is privileged within to engage in the private practice of law within the State of Oregon unless a member of the Oregon State Bar. (ORS 9.160)

The Board of Governors state:

> "The professional liability fund was originally created by the Board of Governors of the Oregon State Bar."
>
> "The object of this program was to provide mandatory coverage at minimum cost to attorneys while assuring the public that each attorney in private practice would have certain minimum levels of protection."

No compensation for the public use of the monetary funds resulting from the compelled levy and assessment to support the Professional Liability Fund which was applicable to the public assurance of minimum levels of protection provided to each attorney in private practice was apportioned or identified, and none was paid or credited to any compulsory assessment.

EXHAUSTION OF STATE REMEDIES

12

Plaintiff has paid under duress (threat of disbarment) all assessments levied by defendants as contributions to the administration of the Oregon State Bar Professional Liability Fund to date of this action.

13

Defendants, unless prevented, have and will continue to expend the proceeds received from said assessments for purposes other than the indemnification of lawyers who shall become legally obligated to pay as money damages because of any claim made against such member as a result

of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney, (See paragraph one of this complaint).

14

Defendants will unless otherwise prevented, continue to levy, assess, and collect under threat of suspension from the practice of law involuntary contributions to the Professional Liability Fund.

15

Because defendants, Oregon State Bar, was charged with the administration of the Oregon State Bar Professional Liability Fund and were also members of the judicial branch of the government of the State of Oregon, there was an apparent conflict of interest, and the plaintiff had no independent and unprejudiced tribunal to which to turn for relief.

16

The plaintiff (Warde H. Erwin) filed in the Circuit Court of the State of Oregon, for the County of Clackamas, an action for a declaration of the status of plaintiff as a member of the Oregon State Bar in relation to the administration of the Lawyers Professional Liability Fund of the Oregon State Bar under Chapter 28 ORS.

17

Plaintiff (WHE) shortly thereafter filed an original proceeding under Chapter 28 *Oregon Revised Statutes* directly to the Supreme Court of the State of Oregon, advising that court as to the enigma as to appropriate jurisdiction, and based upon the Supreme Court's own determination to assume original jurisdiction in a previously determined case.

18

After an extended delay, the Chief justice of the Supreme Court of the State of Oregon, entered an order denying jurisdiction ON ITS OWN MOTION, but strangely allowed costs to defendants, and the case proceeded in the Circuit Court of the State of Oregon for the County of Clackamas

wherein defendants filed a motion to dismiss plaintiff's case for failure to allege sufficient facts to constitute a claim for declaratory judgment which the Circuit Court granted.

Plaintiff refused to plead further, and the Circuit Court entered a judgment dismissing plaintiff's claim and awarding costs.

Plaintiff appealed that judgment of dismissal to the Court of Appeals of the State of Oregon which reversed and remanded the case to the Clackamas County Court for determination. Plaintiff's allegation of standing to sue as well as stating a justiciable controversy were approved by the Court of Appeals, and the court held directly that a motion for failure to state a cause of action was improper where standing and justiciability had been properly alleged in a declaratory judgment action.

20

Defendants answered, and plaintiff filed a motion for summary judgment based upon the pleadings as well as documentary admissions of defendants introduced by affidavit, and a request for oral argument.

21

The Circuit Court refused to hear or rule upon plaintiff's motion for summary judgment, and no order was entered in regard thereto, but defendants again sought dismissal of plaintiff's complaint by a claim that plaintiff's complaint failed to state facts sufficient to constitute a claim and did so by abortive motion for summary judgment which was filed some time after plaintiff's motion for summary judgment.

22

The court reserved decision on defendants' motion until final determination thereby preventing any action by plaintiff until dismissal in regard to any hearing on the question of constitutionality or lack of authority in administration.

23

Lawrence Erwin, as a member of the Oregon State Bar, had petitioned for intervention and determination of an

assessment levied against him as a result of payment of trust funds in the amount of $200,000 to a person or firm of lawyers with whom Lawrence Erwin had no relation in his capacity as an attorney.

This assessment was labeled an "SUA assessment" (Supplementary Underwriting Assessment) and was completely without authority, but the payment of the assessment was compelled by threat of automatic withdrawal of his right to practice law unless paid.

The Circuit Court of the State of Oregon refused to make a determination as requested, but instead dismissed plaintiff's complaint without explanation or findings, and without discussion of the illegal SUA assessment.

Plaintiff appealed to the Court of Appeals of the State of Oregon which affirmed without opinion.

24

Plaintiff then petitioned for review by the Supreme Court of the State of Oregon, thereby exhausting all possible remedies through the judicial department of the government of the State of Oregon. The Supreme Court of the State of Oregon (the judicial branch of the Government of Oregon), denied the petition for review on August 15, 2000.

25

In the event that the court agrees that ORS 9.080 and ORS 9.200 are constitutionally flawed as being violative of either or both Amendment V or XIV of the United States Constitution, it would not appear to be necessary to inquire as to whether or not the Professional Liability Fund is being administered without authority granted by ORS 9.080 although the administration by the Bar also constitutes a violation of the equal protection of laws sections of both state and federal constitutions by its administrator as well as prohibiting creation as well as enforcement of any law abridging the privileges and 4 immunities of citizens of the United States under Amendment XIV of the federal constitution.

A simple declaration that "No members of the Oregon State Bar shall be required to pay any assessment levied by the Oregon State Bar Professional Liability Fund and may not be suspended from membership in the Oregon State Bar as a result of such nonpayment," would suffice.

Further, relief could thereafter be determined by the court as required on request and a class action certification would not be required but could be incorporated if necessary in the further procedure.

26

In the event that the court determines that the Oregon Statutes do not violate constitutional prohibitions, then plaintiff requests a determination and findings of fact that the legislatively adopted limitation of authority as applied to the adoption of the Professional Liability Fund have or have not been violated administratively and do or do not violate "equal protection" provisions of the federal constitution as well as the abridgment of the privileges and immunities of citizens of the United States as protected by Amendment XIV of the federal constitution.

The class would then be an interested party to the factual determination inherent in an analysis of the administration of the statutes by the Bar and should be notified of the pending litigation.

27

All Oregon judges are disqualified for conflict of interest on account of failure to provide a completely impartial and unprejudiced interest as required by due process of law under Amendments V and XIV of the federal constitution, each being members of the Oregon State Bar.

28

At no time has any Oregon judge in ruling on any portion of plaintiff's claim ever considered the applicability of defendants' action as affected by federal constitution Amendments V, XIV as restricting the right of a member of the state judiciary and an officer of a state court to hear or rule upon a matter prohibited by the Constitution of the

United States of America, such as the adoption and enforcement without process adopted by the State Legislature, and this case is therefore brought in the United States District Court for the District of Oregon.

29

The Oregon State Bar has levied, and collected by payments from the members of the State Bar Association substantial sums of money and has authorized and permitted said sums to be deposited in the name of the agency created by the bar's Board of Governors known as the Oregon State Bar Professional Liability Fund.

30

The Board of Governors of OSB has also authorized and permitted a person appointed by that agency and known as the CEO of the Oregon State Bar Professional Liability Fund to disburse said funds contrary to and in violation of the authority to that Board by the terms and limitations contained in the provisions of ORS 9.080 (See paragraph 33 as follows:).

31

As of the date of the preparation of this complaint, the balance of funds held in trust by the Oregon State Bar in the name of the Professional Liability Fund is in excess of (exact amount unknown) millions of dollars which is the sole and exclusive property of the members of the Association past and present of the Oregon State Bar Association subject to a trust of the Professional Liability Fund, if valid.

32

The Board of Governors of the Oregon State Bar of the State of Oregon while acting in the authorized capacity as the executive administrator of the Oregon State Bar (ORS 9.080(1) failed and neglected to deposit said fees in the Treasury of the Oregon State Bar and permitted authorized and ratified disbursements to be made therefrom other than upon order of the Board of Governors, all as required by the provisions of ORS 9.170 as follows (as applicable):

"9.170 Duties of officers, deposit and disbursement of fees.

(2) All fees shall be paid into the treasury of the state bar, and when so paid shall become part of its funds and shall be disbursed only on order of the board of governors. (Amended by 1981 c.193 #4; 1981 c331 #1, 1995 c302 #4)"

33

The said Board of Governors authorized, approved, and ratified a payment disbursed from the trust funds described in paragraph 31 of this complaint to or in behalf of Robert Z. and Linda Pranger in the amount of one million two hundred and twenty-five thousand dollars and have agreed to pay an additional $275,000 in the year 2001 in August in settlement of a claim made by the Prangers for compensation for a criminal conviction of Robert for first degree theft suggested by their lawyer, said payment being without authorization and in violation of the trust under which the funds disbursed were held by the Oregon State Bar and in excess of Fund limitation and liability.

34

Plaintiff is informed and believes that the Oregon State Bar purchased from an insurance company a policy of liability insurance to protect any member of the Board of Governors or its agencies from liability for actions unauthorized by law or in violation of the trust placed in said persons, said insurance company being unknown to plaintiffs, and that upon discovery of said company, said insurance company should be added as a party defendant to this said proceeding with appropriate judgment against said insurance company being entered in the sum of one million four hundred ten thousand dollars plus interest thereon at an annual rate at which said amount would have otherwise held by the Oregon State Bar if not so disbursed.

35

Said Board of Governors authorized and approved and

ratified a payment disbursed from the trust funds described in paragraph 31 of this complaint to or in behalf of Parley Pearce and Blair Woodfield or to their representatives in the amount of One Million Five Hundred thousand dollars in the year 1996, in settlement of a claim made by the payees against their legal representatives without authorization and contrary to law in that said claim was not in payment of monetary losses directly resulting from legal liability established against the attorneys and in excess of the publication limits established by the Fund.

36

Said Board of Governors authorized, approved, and ratified a payment disbursed from the trust funds described in paragraph 31 of the complaint to the law firm of Bullivant, Houser, Bailey, Pendergrass & Hoffman, made to assist in a settlement of a claim against nonmembers of the Oregon State Bar, by a client of the recipient firm against the assignors of the vendees' interest in a real estate contract.

The amount of the payment was $200,000 and was totally without authorization and contrary to law and was not made to indemnify any individual attorney found legally liable to a client of the recipient for monetary damage resulting from an act of any attorney representing the claimant.

WHEREFORE, plaintiffs request of this court a declaration as follows or as otherwise compiled by the court:

1. Defendant State of Oregon by and through its legislative branch made and adopted laws which abridged the privileges and immunities of citizens of the United States of America engaged in the private practice of the profession of law within the perimeters of the State of Oregon.

A "privilege" guaranteed by the Constitution of the United States of America, is the right to engage in a lawful enterprise, occupation, or profession.

An immunity from abridgment of that right or privilege is protected by the due process and equal protection of law

provisions of amendments V and XIV of the Constitution of the United States of America, both of which are violated by ORS 9.080, ORS 9.200, and Chapter 752 ORS.

Both right to immunity and privilege to engage in the practice of the profession of law are abridged by the deprivation and due process and equal profession of laws.

Chapter 752 provides the same subject matter as that legislated by ORS 9.080 and 9200 as "ALL" professions practicing in Oregon leaving the profession of law subject to the provisions of ORS 9.080 and ORS 9.200 as to automatic disbarment without appeal while Chapter 752 ORS makes no provision for automatic withdrawal of the privilege of practice of other professions.

2. Defendant Oregon State Bar and Board oil Governors of the Oregon State Bar are instrumentalities of the Judicial Department of the government of the State of Oregon (ORS 9.010) and are thereby subject to the mandates made applicable directly to each state of the United States by Amendments V and XIV of the Constitution of the United States of America.

3. Until further order of this court, the relationship between plaintiffs and defendants as to the liability and enforcement of assessments in support of the Oregon State Bar Professional Liability Fund are hereby terminated and abated, and no further assessments shall be levied or collected unless upon order of this court.

4. The defendants are hereby ordered and required to show cause before this court why they should not be held to account to the members of the Oregon State Bar for all expenditures for purposes other than reimbursement to such members for such monetary funds as any member had become legally obligated to pay as money damages because of a certain claim made against said member by a client as a result of any act or omission of such member in rendering of failing to render professional services for others in the member's capacity as attorney or legally responsible (see paragraph one, this complaint).

5. Defendants are hereby ordered and required to show cause before this court under what authority the assessment made against Lawrence W. Erwin was authorized as complying with the authority of ORS 9.080 and ORS 9.200.

6. For judgment against defendant Oregon State Bar and its insurance company in the amount of Two Million nine hundred twenty-five thousand dollars, together with interest on the sum of One Million Four Hundred Ten thousand dollars, together with interest on each of said sums from date of withdrawal until repaid to the Oregon State Bar at a rate sufficient to equal that of average rate received by the Oregon State Bar on other funds on deposit and as described in paragraph 31 of the complaint.

7. For plaintiff's costs and disbursements incurred herein, and for such other and further relief as may to this court seem to be just and equitable.

8. For the determination and allowance of a reasonable attorney fee to be allowed and paid to plaintiff.

Dated this 1st day of February, 2001.

/S/ Warde H. Erwin
Warde H. Erwin
OSB #39011
503 226 4525
Attorney Pro per

6. FEDERAL ACT

a) Title 28, Section 2201 USCA

2201 CREATION OF REMEDY

a) "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 28, Section 2202 states:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment."

U.S. District Court
District of Oregon (Portland)
CIVIL DOCKET FOR CASE
No: 3-01-00177-FR

ERWIN V. OREGON, ET AL

Assigned to Judge Helen J. Frye
Referred to:
Demand: $2,900,000
Lead Docket: None
Related Cases: None
Dkt# in other court: None
Cause: 28:2201 Declaratory Judgment
Date Filed: 02/06/01
Jury Demand: None
Nature of Suite: 950
Jurisdiction: Federal Question

Plaintiff

Warde H. Erwin

Represented by
Warde H. Erwin, PRO SE

Warde H. Erwin
2110 SW Jefferson St.
Suite 100
Portland, OR 97201
(503) 226-4525

v.

Defendant

State of Oregon, by and through the
Honorable John Kitzhaber, Governor
of the State of Oregon

Represented by
Cynthia A. Botsios

Department of Justice
1162 Court Street NE
Salem, OR 97310-4096
(503) 378-6313
Fax: (503) 378-2056
Email: cynthia.botsioz@dobj.state.or.us

Oregon State Bar, and its Board of Governors as it Executive Administrators, and the unknown Insurance Company providing malfeasance insurance, for the officers, directors and employees of the Oregon State Bar

Represented by
Janet Marie Schroer
Hoffman, Hart & Wagner, L.L.P
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(503) 222-4499
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Filing Date, #, Docket Text
02/06/2001, #1, Complaint against Oregon State Bar, State of Oregon. *Petition for Declaratory Judgment*. Filing Fee collected. Receipt #.435542 issued. Filed by Warde H. Erwin (jlr,) Entered: 02/07/2001)

02/06/2001, #2 Discovery and Pretrial Scheduling Order: Discovery to be completed by 6/6/2001. Joint ADR Report due by 7/8/2001. Pretrial Order due by 7/8/2001. (jlr,) (Entered: 02/07/2001)

02/16/2001, #3 Motion for Extension of Time to Answer *For First Appearance Pursuant to FRCP 6(b).* (Related document(s)1) Filed by Oregon State Bar. (jlr,) (Entered: 02/16/2001)

02/16/2001, #4 Affidavit of *Janet M. Schroer in Support of Motion To Enlarge Time for First Appearance of Defendant Oregon State Bar.* (Related document(s)3) Filed by Oregon State Bar. (jlr,) (Entered: 02/16/2001)

02/16/2001, #5 Certificate of Service. (Related document(s)3, 4) Filed by Oregon State Bar. (jlr,) (Entered: 02/16/2001)

02/21/2001, #6 Record of Order Granting defendant Oregon State Bar's unopposed Motion to Enlarge Time for First Appearance to March 26, 2001 (Related Doc #3). by Judge Helen J. Frye. (Austad, Mary) (Entered: 02/22/2001)

03/01/2001, #7 Unopposed Motion for Extension of Time to Answer. (Related documents(s)1) Filed by State of Oregon. (jlr,) (Entered: 03/01/2001)

03/02/2001, #8 Order Granting State of Oregon's unopposed Motion for Extension of Time to Answer to 4/11/01. (Related Doc #7). by Judge Helen J. Frye. (jlr,) (Entered: 03/02/2001)

03/08/2001, #9 Motion for Order *To Prove Authority.* Response due by 3/22/2001. Filed by Warde H. Erwin (jlr,) (Entered: 03/08/2001)

03/12/2001, #10 Return of Service Executed upon Amy Powell for Governor, State of Oregon on 2/22/01. Filed by Warde H. Erwin. (jlr,) (Entered: 03/12/2001)

03/14/2001, #11 Response to Motion *To Prove Authority.*

Filed by Oregon State Bar. Reply due by 3/28/2001. (Related motion(s)9) (jlr,) (Entered: 03/14/2001)

03/14/2001, #12 Affidavit of *Marjorie A. Speirs in Support of Defendant Oregon State Bar's Response to Plaintiff's Motion To Prove Authority*. (Related document(s)11) Filed by Oregon State Bar. (jlr,) (Entered: 03/14/2001)

03/23/2001, #13 Motion to Dismis., Alternative Motion for Summary Judgment. Response due by 4/6/2001. Filed by Oregon State Bar. (jlr,) (Entered: 03/26/2001)

03/23/2001, #14 Memorandum in Support *of Motion To Dismiss and Alternative Motion For Summary Judgment*. Filed by Oregon State Bar. (Related motion(s)13) (jlr,) (Entered: 03/26/2001)

03/23/2001, #16 Concise Statement of Material Fact *In Support of Defendant Oregon State Bar's Motion for Summary Judgment*. (Related document(s)13) Filed by Oregon State Bar, (jlr,) (Entered: 03/26/2001)

04/05/2001, #17, Motion to Dismiss. Response due by 4/19/2001. Filed by State of Oregon. (jlr,) (Entered: 04/05/2001)

04/06/2001, #18, Motion to Strike *Or Abate the Appearance of Counsel For The Oregon State Bar and Its Board of Governors Pending Proof of Authority of Counsel*. Response due by 4/20/2001. Filed by Warde H. Erwin. (jlr,) (Entered: 04/06/2001)

04/06/2001, #19, Memorandum in Support *Brief In Support of Plaintiff's Motion To Strike or Abate Appearance by Defendants Bar and Board By Motion For Summary Judgment For Lack of Jurisdiction*. Filed by Warde H. Erwin. (Related Motion(s)18) (jrl,) (Entered: 04/06/2001)

04/10/2001, #20, Motion for Order *To Abate State of Oregon's Motion To Dismiss.* Response due by 4/24/2001. Field by Warde H. Erwin. (jlr,) (Entered: 04/10/2001)

04/12/2001, #21, Supplemental Memorandum in Support of *Motion To Dismiss.* Filed by Oregon State Bar. (Related motion(s)13) (jlr,) (Entered: 04/13/2001)

04/12/2001, #22, Response to Motion *Opposition To Plaintiff's Motion To Strike or Abate Appearance.* Filed by Oregon State Bar. Reply due by 4/26/2001. (Related motion(s)18) (jlr,) (Entered: 04/13/2001)

04/12/2001, #23, Notice *Defendant Oregon State Bar's Certification Re March 23, 2001 Motion.* (Related document(s)13) Filed by Oregon State Bar. (jlr,) (Entered: 04/13/2001)

04/19/2001, #24, Response to Motion *State of Oregon's Objection to Plaintiff's Motion to Abate.* Filed by State of Oregon. Reply due by 5/3/2001. (Related motion(s)20) (jlr,) (Entered: 04/24/2001)

04/30/2001, #25, Response to Motion *Plaintiff's Reply To Defendant's Motion To Dismiss or For Summary Judgment.* Filed by Warde H. Erwin. Reply due by 5/14/2001. (Related motion(s)13) (jlr,) (Entered: 04/30/2001)

05/02/2001, #26, Record of Order. Plaintiff's motion for order to prove authority (Related Doc #9), plaintiff's motion to strike or abate the appearance of counsel for the Oregon State Bar...(Related Doc #18). and plaintiff's motion to abate the State of Oregon's motion to dismiss (Related Doc #20) are DENIED. By Judge Helen J. Frye. (jlr,) (Entered: 05/03/2001)

05/14/2001, #27, Reply to Motion *Re Motion To Dismiss and*

Alternative Motion For Summary Judgment. Filed by Oregon State Bar. (Related motion(s)13) (jlr,) (Entered: 05/16/2001)

05/16/2001, #28, Motion for Hearing *To Present Evidence In Support of Factual Statement of Counsel.* Response due by 5/30/2001. Filed by Warde H. Erwin. (jrl,) (Entered: 05/17/2001)

05/18/2001, #29, Response to Motion *Objection to Plaintiff's Motion For Hearing To Present Evidence.* Filed by Oregon State Bar. Reply due by 6/1/2001. (Related motion(s)28) (jlr,) (Entered: 05/18/2001)

05/18/2001, #30, Response to Motion *State of Oregon's Objection to Plaintiff's Motion For Hearing To Present Evidence.* Filed by State of Oregon. Reply due by 6/1/2001. (Related motion(s)28) (jrl,) (Entered: 05/18/2001)

6/12/2001, #31, Reply to Motion *Supplemental Authorities.* Filed by Warde H. Erwin. (Related motion(s)28) (jlr,) (Entered: 06/12/2001)

07/16/2001, #32, Motion to Strike *Affidavit of Marjorie D. Spiers in Support of Defendant, Oregon State Bar's Motion to Dismiss and Alternatively Motion for Summary Judgment* (Related document(s)15) Filed by Warde H. Erwin. (lam,) (Entered: 07/16/2001)

07/20/2001, #33, Response to Motion *To Strike the Affidavit of Marjorie A. Speirs.* Filed by Janet Marie Schroer on behalf of Oregon State Bar. (Related motion(s)32) (jlr,) (Entered: 07/23/2001)

07/23/2001, #34, Opinion by Judge Helen J. Frye. 1) defendant Oregon State Bar's motion to dismiss and alternative motion for summary judgment (#13) is granted; 2) defendant State of Oregon's motion to dismiss (#17) is

granted; 3) plaintiff's motion for hearing to present evidence in support of factual statement of counsel (#28) is denied; and 4) plaintiff's motion to strike (#32) is denied. Signed 7/23/01 (Related document(s)13, 32, 28, 17,) (jlr,) (Entered: 07/23/2001)

07/23/2001, #35, Oregon Granting Oregon State Bar's Motion to Dismiss and Alternative Motion for Summary Judgment (Related Doc #13)., Order Granting State of Oregon's Motion to Dismiss (Related Doc #17). Order Denying Plaintiff's Motion for Hearing (Related Doc #28). Order Denying Plaintiff's Motion to Strike Related Doc #32)., (jlr,) (Entered: 07/24/2001)

07/23/2001, #36, Judgment: Judgment is entered in favor of the defendants and against the plaintiff. Signed 7/23/01 by Judge Helen J. Frye. (jlr,) (Entered: 07/24/2001)

FILED:
2001 JUL 23 2:21
Clerk, U.S. District Court
District of Oregon
Portland, Oregon
By: /S/

No. 01-177-FR

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WARDE H. ERWIN, Plaintiff

v.

THE STATE OF OREGON, by and through the Honorable JOHN KITZHABER, Governor of the State of Oregon; THE OREGON STATE BAR, and its Board of Governors as its Executive Administrator; and THE UNKNOWN INSURANCE COMPANY PROVIDING MALFEASANCE INSURANCE for the Officers, Directors, and Employees of the Oregon State Bar, Defendants

OPINION

Warde H. Erwin
2110 SW Jefferson Street, Ste. 100
Portland, Oregon 97201
Plaintiff Pro Se

Hardy Myers
Attorney General
Cynthia A. Botsios

Assistant Attorney General
1162 Court Street, NE
Salem, Oregon 97301-4096
Attorneys for State of Oregon Defendants

Janet M. Schroer
Marjorie A. Speirs
Hoffman, Hart & Wagner, LLP
1000 S. W. Broadway, 20" Floor
Portland, Oregon 97205
Attorneys for Defendants Oregon State Bar and its Board of Governors as its Executive Administrator

FRYE, Judge:

The matters before the court are:

1) defendant Oregon State Bar's motion to dismiss and alternative motion for summary judgment (#13);

2) defendant State of Oregon's motion to dismiss (#17);

3) plaintiff 's motion for a hearing to present evidence in support of factual statement of counsel (#28); and

4) plaintiffs motion to strike (#32).

FACTS

On April 13, 1995, Warde H. Erwin filed a complaint in the Circuit Court of the State of Oregon for the County of Clackamas against the Professional Liability Fund and the Board of Governors of the Oregon State Bar. In July of 1995, Erwin filed a first amended complaint for a declaratory judgment in this Clackamas County case.

After the Clackamas County judge granted the defendants' Rule 21 motions against he first amended complaint, Erwin filed a second amended complaint against the Oregon State Bar and the Board of Governors of the Oregon State Bar. The Clackamas County judge granted the defendants' Rule 21 motions to dismiss or to strike Counts 2 through 8 if the second amended complaint. Erwin then filed

a notice of appeal from the judgment dismissing his claims in the Clackamas County case.

On July 2, 1997, the Court of Appeals for the State of Oregon affirmed in part and reversed in part. *Erwin v. Oregon State Bar*, 149 Or. App. 99, 941 P.2d 1094 (1997). The Oregon Court of Appeals found that Erwin had stated a claim in Counts 3, 4 and 6 described by the court as follows:

> In Count 3, plaintiff alleges that the automatic suspension provision of ORS 9.200 for nonpayment of PLF assessments is unconstitutional because it deprives a nonpaying member of due process of law. 149 Or. App. at 107.
>
> Count 4 alleges that the suspension of a member of the Bar from the practice of law for failure to pay the PLF assessment is a taking of property without just compensation in violation of both the Oregon and United States Constitutions. *Id.* at 109.
>
> Count 6 alleges that the Bar collects two kinds of assessments, "Annual assessments" and "Supplemental underwriting assessments." Plaintiff further alleges that the Board "uses the funds collected by such assessment for numerous activities unauthorized by ORS 9.080 to the extent of hundreds of thousands of dollars annually. . . ." *Id.* at 110.

The Oregon Court of Appeals remanded the case for resolution of Counts 3, 4 and 6. *Id.*

Upon remand and after further proceedings, a trial to the court was held before a state circuit court judge on April 9, 1998. On May 22, 1998, the state trial Judge filed a letter opinion stating as follows:

> The Court finds and concludes as follows:

1. In 1977 the Oregon Legislature authorized the Board of Governors of the Oregon State Bar to establish a "Professional Liability Fund" to provide all Oregon attorneys in private practice with professional liability, insurance.

2. The Professional Liability Fund (PLF) was thereupon established by the Board of Governors and its membership and has been providing insurance coverage to Oregon lawyers for twenty years.

3. The PLF is funded by assessments collected from members of the Oregon State Bar who are in private practice.

4. The fund created by such assessments is used for the following purposes:

A. To defend claims against bar members;
B. To pay settlements of claims against bar members;
C. To pay covered claims bar members may become legally obligated to pay;
D. To fund Loss Prevention Educational programs;
E. To fund Attorney Assistance programs to limit exposure;
F. To pay operating costs associated with administering the PLF.

5. The foregoing expenditures are authorized by ORS 9.080 and ORS 9.200, are rationally related to the establishment and operation of the PLF and are necessary and convenient to its implementation.

. . .

9. The claims of Intervenor are without merit for the reasons noted. Further, certain claims of Intervenor exceed the scope of plaintiffs Second

> Amended Complaint. On their merits, such claims have been heretofore resolved by way of an executed settlement agreement to which Intervenor was a party.
>
> The Court finds for the defendant on all issues herein and adopts the rationale set forth in defendant's well-reasoned Trial Memorandum.
>
> The questioned statutes are, in all respects, constitutional and the expenditures of the PLF are authorized by statute...
>
> Exhibit V to Affidavit of Marjorie A. Speirs in Support of Defendant Oregon State Bar's Motion to Dismiss and Alternative Motion for Summary Judgment.

Erwin filed a notice of appeal with the Oregon Court of Appeals. On April 5, 2000, the Oregon Court of Appeals affirmed without opinion.

Erwin filed a petition for review with the Oregon Supreme Court. On August 15, 2000, the Oregon Supreme Court denied his petition for review.

Erwin did not file an appeal to the United States Supreme Court.

On February 6, 2001, plaintiff Warde H. Erwin filed this action in the United States District Court for the District of Oregon. In this action, plaintiff Erwin alleges that he is a member in good standing of the Oregon State Bar, and that he brings this "PETITION for Declaratory Judgment Under Title 28, U.S.C. #2201" against defendants "THE STATE OF OREGON, BY AND THROUGH THE HONORABLE JOHN KITZHABER, Governor of the State of Oregon; THE OREGON STATE BAR, AND ITS BOARD OF GOVERNORS AS ITS EXECUTIVE ADMINISTRATOR, and the UNKNOWN INSURANCE COMPANY PROVIDING

MALFEASANCE INSURANCE, for the Officers, Directors, and Employees of the Oregon State Bar." Petition for Declaratory Judgment, p. 1.

Erwin further alleges that this action is based upon "Title 28 USC 2201" and raises a question of the validity of legislation by the Oregon State Legislature under Amendments V and XIV of the Constitution of the United States of America as affecting the plaintiff and all members of the Oregon State Bar as a class in their relation to the defendants in the administration of the Oregon State Bar's Professional Liability Fund.

Erwin cites to O.R.S. 9.080 and O.R.S. 9.200 authorizing the Board of Governors to establish the Lawyers' Liability Fund. Erwin alleges that the Board of Governors chose to enforce the collection of monetary assessments to be levied against the members of the Oregon State Bar in order to finance the Professional Liability Fund by suspending and withdrawing the right of any member to engage in the practice of law automatically and without a hearing upon the failure to pay any such assessment so levied and to automatically deprive the member of the right to vote.

Erwin further alleges that the adoption and implementation of these legislative actions as administered by the Oregon State Bar violate the following provisions of the United States Constitution: 1) Amendment XIV privileges and immunities; 2) Amendment protection of the laws and immunities; V and XIV due process 3) Amendment XIV equal protection and 4) Amendment V taking of private property for public use without just compensation.

Erwin alleges that the Legislature of the State of Ore-on has deliberately violated each of said federal constitutional provisions in regard to the establishment of a Professional Liability Fund and its enforcement by levying monetary assessments against each member of the Bar and by enforcing and compelling payment of said assessment by withdrawing each member's right to practice law in the event of failure to pay any such assessment.

In his petition, Erwin alleges that he filed an action for declaration of his status as a member of the Oregon State Bar in relation to the administration of the Lawyers' Professional Liability Fund of the State of Oregon in the Circuit Court of the State of Oregon. Erwin alleges that the Circuit Court of the State of Oregon in the earlier state court action refused to make a determination as requested, but instead dismissed his complaint without explanation or findings.

Erwin seeks a declaration by this federal court that the State of Oregon, by and through its legislative branch, made and adopted laws which abridged the privileges and immunities of citizens of the United States engaged in the private practice of law within the perimeters of the State of Oregon, as well as an order to show cause why the defendants should not be "held to account to the members of the Oregon State Bar for all expenditures purposes other than reimbursement to such members for such monetary funds as any member had become legally obligated to pay as money damages because of a certain claim made against said member by a client as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity nas attorney or legally responsible. . . ." Petition for Declaratory Judgment, p. 30. Erwin seeks a "Judgment against defendant Oregon State Bar and its insurance company in the amount of Two Million nine hundred twenty-five thousand dollars . . ." *Id.* at 31.

CONTENTIONS OF THE PARTIES

The defendants move to dismiss this action or, in the alternative, for summary judgment on the grounds that 1) this court lacks subject matter jurisdiction because the petition of the plaintiff is barred by the grant of immunity in the Eleventh Amendment to the United States Constitution; 2) this court lacks subject matter jurisdiction because the

plaintiffs petition is barred by the *Rooker-Feldman* doctrine; and 3) the plaintiffs petition is barred on the grounds of issue preclusion and claim preclusion.

Erwin contends that the Eleventh Amendment only bars actions against a state by citizens of another state and does not bar actions against a state by citizens of the same state. Erwin contends that the *Rooker-Feldman* doctrine is not applicable to a request for a judicial declaration of the actions of the State of Oregon in violating a provision of the United States Constitution.

Erwin further contends that claim preclusion does not bar this action because no final judgment embracing all issues was ever entered. Erwin contends that claim preclusion does not apply to constitutional questions because constitutional questions may be raised at any time on appeal if a court is persuaded that the issue is of sufficient concern.

ANALYSIS

1. Eleventh Amendment

The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." In *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1173 (9th Cir. 1984), the United States Court of Appeals for the Ninth Circuit stated that the Eleventh Amendment applies to limit a federal court from entertaining "an action brought by a citizen against his or her own state."

The Eleventh Amendment bars citizens from bringing suits in federal court against a state for prospective relief or for money damages unless immunity is waived by the state or abrogated by the United States Congress. *Cory v. White*, 457 U.S. 85, 90-91 (1982). Erwin seeks a money judgment for more than $3,000,000, as well as a Judicial declaration providing him prospective relief, however, there has been no waiver by the State of Oregon or abrogation of immunity by the United States Congress. This federal court lacks subject

matter jurisdiction because Erwin's petition is barred by the Eleventh Amendment to the United States Constitution.

The Oregon State Bar is an arm of the State of Oregon and is entitled to immunity from suit in federal court as provided by the Eleventh Amendment to the United States Constitution. O.R.S. 9.010; *see Hirsh v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995).

2. Issue and Claim Preclusion and the Rooker-Feldman Doctrine Under the Full Faith and Credit Act, federal courts must give state judicial proceedings "the same full faith and credit . . . as they have by law or usage in the courts of [the] State . . . from which they are taken." 28 U.S.C. § 1738. A federal court must give a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988).

Claim preclusion provides that a:

> " plaintiff who has prosecuted one action against a defendant through to a final judgment * * * is barred [*i.e.*, precluded] * * * from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action."

Drews v. EBI Cos., 310 Or. 134,140 (1990) (quoting *Rennie v. Freeway Transport*, 294 Or. 319, 323, 656 P.2d 919 (1982)).

Claim preclusion prohibits a party from relitigating a cause of action against the same defendant involving the same factual transaction as was litigated in the previous adjudication. *Shuler v. Distribution Trucking Co.*, 164 Or. App.

615, 621 (1999), rev. denied, 330 Or. 375 (2000). Claim preclusion arises when the parties have had the opportunity to litigate the issue. *Drews*, 3 10 Or. at 140.

Issue preclusion, on the other hand, prevents relitigation of a legal or factual issue if the issue was "actually litigated and determined" in a setting where "its determination was essential to" the final decision reached. Id. at 139 (internal quotations omitted).

The record in this case establishes clearly that Erwin had the opportunity to litigate and in fact did litigate in the state court action the same claims and issues raised in this federal court action against the same parties. The state court action raised and resolved the same issues raised in this federal action against the same defendants. The state trial court found, in relevant part, that:

> 6. The suspension provision of ORS 9.200 for non payment of PLF assessments is not violative of constitutional "due process" requirements as alleged in Count 3 of plaintiffs Second Amended Complaint.
>
> 7. The suspension provision of ORS 9.200 is not an unconstitutional "taking" of property without just compensation as alleged in count 4 of plaintiffs Second Amended Complaint.
>
> 8. ORS 9.080 and 9.200 do not constitute an unlawful or unconstitutional delegation of legislative authority.

Exhibit V to Affidavit of Marjorie Speirs, p. 2. Final judgment was entered on June 9, 1998. This final judgment was affirmed by the Oregon Court of Appeals, and review was denied by the Oregon Supreme Court. These are the same issues that Erwin has raised in the action before this court. Erwin is precluded from relitigating these claims in this federal court.

To the extent that Erwin seeks to appeal to this court from the state court action, such an appeal is not proper and is barred by the *Rooker-Feldman* doctrine which bars the lower federal court from exercising appellate jurisdiction over a state court action, even when the challenge involves federal constitutional issues. *See Worldwide Church of God v. McNair*, 805 F.2d 888, 890-91 (9th Cir. 1986).

CONCLUSION

The court rules as follows:

1) defendant Oregon State Bar's motion to dismiss and alternative motion for summary judgment (#13) is granted;

2) defendant State of Oregon's motion to dismiss (#17) is granted;

3) plaintiffs motion for a hearing to present evidence in support of factual statement of counsel (#28) is denied; and

4) plaintiffs motion to strike (#32) is denied.

DATED this 23 day of July, 2001.

/S/ Helen J. Frye
HELEN J. FRYE
United States District Judge

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 01-35830 Filed: 9/5/01
Nsuit: 3950 Constitutional state stat (Fed)
Erwin V. State of Oregon, et al
Appeal from: District of Oregon (Portland)

Case type information:
1) civil
2) Private

Lower court information:
District: 0979-3 : CV-01-00177-FR
Presiding Judge: Helen J. Frye, District Judge
Date Filed: 2/6/01
Date Order/Judgment: 7/23/01
Date NOA Filed: 8/16/01

Plaintiff - Appellant
Warde Erwin

Represented by:
Warde Erwin
503-226-4525
Suite 100
(COR LD NTC prs)
ERWIN & ERWIN
2110 SW Jefferson Street
Portland, OR 97239-7702

v.

Defendant - Appellee
STATE OF OREGON, by and
through the Honorable John Kitzhaber,
Governor of the State of Oregon

Represented by:
Cynthia A. Botsios
503-378-6313
[COR LD NTC ag]
DEPARTMENT OF JUSTICE
1162 Court Street, NE
Salem, OR 97310

OREGON STATE BAR, and its
Board of Governors, as its Executive Administrator,
and the Unknown Insurance Company,
providing malfeasance insurance for the
officers, directors and employees of
the Oregon State Bar

Represented by:
Janet Schroer
503-222-4499
20th Floor
[COR LD NTC ret]
HOFFMAN HART & WAGNER
1000 SW Broadway
Portland, OR 97205

9/5/01 DOCKETED CAUSE AND ENTERED APPEARANCE OF APPELLANT IN PRO PER AND COUNSEL FOR APPELLEES. CADS SENT (Y/N): N. Setting schedule as follows: appellant's designation of RT is due 8/27/01; appellee's designation of RT is due 9/5/01; appellant shall order transcript by 9/17/01; court reporter shall file transcript in DC by 10/16/01; certificate of record shall be filed by 10/23/01; appellant's opening brief is due 12/3/01; appellees' brief is due 1/2/02; appellants' reply brief is due 1/15/02. [01-35830] (ru)

9/20/01 Received orig and 15 copies Appellant Warde H.

Erwin's brief of 29 pages (Informal: no); served on 9/18/01 (deficiencies: missing cert of comp and st of real cases) Notified Aplt. [01-35830] response to brief deficiency notice due 10/4/01; (gail)

10/1/01 Received appellant Warde H. Erwin's satisfaction of (major) brief deficiency, served on 9/28/01 (cert of comp and st of rel cases) [01-35830] (gail)

10/1/01 Filed original and 15 copies Appellant Warde H. Erwin opening brief (Informal: no) 29 pages and five excerpts of record in 01 volumes; served on 9/18/01 [01-35830] (gail)

10/256/01 Filed certificate of record on appal RT filed in DC 10//19//01 [01-35830] (vt)

12/16/01 Filed original and 15 copies appellees State of Oregon and Oregon State Bar's 23 pages brief and 01 vol. supp'l exc of record; served on 12/18/01 (gail)

1/2/02 Received orig and 15 copies Warde H. Erwin's reply brief (Informal: No) of 10 pages; served on 12/28/01 (deficiency: missing cert of comp) Notified counsel. [01-35830] response to brief deficiency notice due 1/16/02; (gail)

1/7/02 Filed original and 15 copies appellees State of Oregon and John Kitzhaber's 1 page brief joining brief of Appellees Oregon State Bar and its Board of Governors, filed on 12/16/01; served on 1/2/02 [01-35830] (gail)

1/14/02 Filed Aple' additional citations, served on 1/8/02 STAFF [01-35830] (gail)

1/14/02 Received Appellant Warde H. Erwin's satisfaction of (major) brief deficiency (cert of comp for rpy brf)

[01-35830] (gail)

1/14/02 Filed original and 15 copies Warde H. Erwin reply brief, (Informal: no) 10 pages; served on 12/28/01 [01-35830] (gail)

1/29/02 Filed Aplt's additional citation, served on 1/22/02 **RECORDS/MERITS PANEL** [01-35830] (gail)

2/6/02 Calendar check performed [01-35830] (th)

3/8/02 Screening letter sent. [01-35830] (th)

3/18/02 Filed Aples State of Oregon and Oregon State Bar additional citations, served on 3/15/02 STAFF [01-35830] (gail)

3/18/02 Received Appellant response to screening letter (mtn re oral arg) STAFF [01-35830] (gail)

3/28/02 FILED CERTIFIED RECORD ON APPEAL: 1 CLERK'S RECORD & 1 EXPANDO. (ORIGINAL) [01-35830] (sd)

5/28/02 Filed Warde H. Erwin additional citations, served on STAFF [01-35830] (em)

6/10/02 Received Janet Schroer for Appellee Oregon State Bar letter dated 6/5/02 re: response to addl cites filed by Aplt STAFF [01-35830] (gail)

7/22/02 SUBMITTED TO SCREENING PANEL 343. (Oral) [01-35830] [01-35830] (th)

7/29/02 Filed Appellant Warde H. Erwin's motion for summary judgment; exhibits; served on 7/26/02 [4491796] (to MOATT) [01-35830] (hh)

7/30/02 FILED MEMORANDUM: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Unsigned, Unpublished. James R. BROWNING, Alex KOZINSKI, Marsha S. BERZON) FILED AND ENTERED JUDGMENT. [01-35830] (sm)

8/5/02 Received Appellant Warde H. Erwin letter dated 7/30/02 re: case cited in motion for summary judgment. (CASEFILES) [01-35830] (hh)

8/12/02 Filed Appellee Oregon State Bar bill of costs ($289.20), served on 8/8/02 [01-35830] (hh)

8/21/02 MANDATE ISSUED; COSTS TAXED in the amount of $289.20. [01-35830] (sm)

8/26/02 [4525584] Received original and 3 copies Appellant Warde Erwin petition for rehearing, deficient: late, served on 8/15/02. Notified pro se aplnt: no. (to STAFF w/copy of motion to file late petition) (ru)

8/26/02 Filed Appellant Warde Erwin's motion to allow late filing of petition for rehearing, served on 8/15/02 (to STAFF w/copy of petition for rehearing) [01-35830] (ru)

9/30/02 Received Warde Erwin's request for publication of memorandum disposition (timely); served on 9/23/02 (to STAFF) [01-35830] (crw)

10/23/02 Received letter from the Supreme Court dated 10/16/02 re: the application for an ext of time within which to file a petition for a write of certiorari . . . extended the time to and including 11/27/02. [01-35830] (hh)

Cite as: 535 U.S. ____ (2002)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 00-1531 and 00-1711

VERIZON MARYLAND INC., PETITIONER
00-1531 *v.*
PUBLIC SERVICE COMMISSION OF MARYLAND *et al.*

UNITED STATES, PETITIONER
00-1711 *v.*
PUBLIC SERVICE COMMISSION OF MARYLAND *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[May 20, 2002]

JUSTICE SCALIA delivered the opinion of the Court.

These cases present the question whether federal district courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet Service Providers violates federal law.

I

The Telecommunications Act of 1996 (1996 Act or Act), Pub. L. 104-104, 110 Stat. 56, created a new telecommunications regime designed to foster competition in local telephone markets. Toward that end, the Act imposed various obligations on incumbent local-exchange carriers (LECs), including a duty to share their networks with competitors. See 47 U. S. C. §251(c) (1994 ed., Supp. V). When a new entrant seeks access to a market, the incumbent LEC must "provide ... interconnection with" the incumbent's existing network, §251(c)(2), and the carriers must then establish "reciprocal compensation arrangements" for transporting and terminating the calls placed by each others' customers, §251(b)(5). As we have previously described, see *AT&T Corp. v. Iowa Utilities Bd.*, 525 U. S. 366, 371-373 (1999), an incumbent LEC "may negotiate and enter into a binding agreement" with the new entrant "to fulfill the duties" imposed by §§251(b) and (c), but "without regard to the standards set forth" in those provisions. §§252(a)(1), 251(c)(1). That agreement must be submitted to the state commission for approval, §252(e)(1), which may reject it if it discriminates against a carrier not a party or is not consistent with "the public interest, convenience, and necessity," §252(e)(2)(A).

As required by the Act, the incumbent LEC in Maryland, petitioner Verizon Maryland Inc., formerly known as Bell Atlantic Maryland, Inc., negotiated an interconnection agreement with competitors, including MFS Intelenet of Maryland, later acquired by respondent MCI WorldCom, Inc. The Maryland Public Service Commission (Commission) approved the agreement. Six months later, Verizon informed WorldCom that it would no longer pay reciprocal compensation for telephone calls made by Verizon's customers to the local access numbers of Internet Service Providers (ISPs), claiming that ISP traffic was not "local

traffic"[1] subject to the reciprocal compensation agreement because ISPs connect customers to distant Web sites. WorldCom disputed Verizon's claim and filed a complaint with the Commission. The Commission found in favor of WorldCom, ordering Verizon "to timely forward all future interconnection payments owed [WorldCom] for telephone calls placed to an ISP" and to pay WorldCom any reciprocal compensation that it had withheld pending resolution of the dispute. Verizon appealed to a Maryland state court, which affirmed the order.

Subsequently, the Federal Communications Commission (FCC) issued a ruling—later vacated by the Court of Appeals for the D. C. Circuit, see *Bell Atlantic Tel. Cos.* v. *FCC*, 206 F. 3d 1 (2000)—which categorized ISP-bound calls as nonlocal for purposes of reciprocal compensation but concluded that, absent a federal compensation mechanism for those calls, state commissions could construe interconnection agreements as requiring reciprocal compensation. Verizon filed a new complaint with the Commission, arguing that the FCC ruling established that Verizon was no longer required to provide reciprocal compensation for ISP traffic. In a 3-to-2 decision, the Commission rejected this contention, concluding that, as a matter of state contract law, WorldCom and Verizon had agreed to treat ISP-bound calls as local traffic subject to reciprocal compensation.

Verizon filed an action in the United States District Court

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[1] Section 1.61 of the interconnection agreement provides: "Reciprocal Compensation' is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic originating on one Party's network and terminating on the other Party's network." In turn, §1.44 defines "'Local Traffic'" as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ('EAS') area, as defined in [Bell Atlantic's] effective Customer tariffs. Local Traffic does not include traffic originated or terminated by a commercial mobile radio service carrier."

for the District of Maryland, citing 47 U. S. C. §252(e)(6) and 28 U. S. C. §1331 as the basis for jurisdiction, and naming as defendants the Commission, its individual members in their official capacities, WorldCom, and other competing LECs. In its complaint, Verizon sought declaratory and injunctive relief from the Commission's order, alleging that the determination that Verizon must pay reciprocal compensation to WorldCom for ISP traffic violated the 1996 Act and the FCC ruling.

The District Court dismissed the action, and a divided panel of the Court of Appeals for the Fourth Circuit affirmed. 240 F. 3d 279 (2001). The Fourth Circuit held that the Commission had not waived its immunity from suit by voluntarily participating in the regulatory scheme set up under the 1996 Act, and that the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), does not permit suit against the individual commissioners in their official capacities. It then held that neither 47 U. S. C. §252(e)(6) nor 28 U. S. C. §1331 provides a basis for jurisdiction over Verizon's claims against the private defendants. Both Verizon and the United States, an intervenor below, petitioned this Court for review of the four questions resolved by the Fourth Circuit. Because we had previously granted certiorari in *Mathias* v. *WorldCom Technologies, Inc.*, 532 U. S. 903 (2001), which raised all but the question whether §1331 provides a basis for jurisdiction, we granted certiorari only on the §1331 question and set the case for oral argument in tandem with *Mathias*. 533 U. S. 928 (2001). After oral argument, for reasons explained in our decision in *Mathias* released today, *post*, p. ___, we granted certiorari on the remaining three questions presented in these cases. 534 U. S. 1072 (2001).

II

WorldCom, Verizon, and the United States contend that 47 U. S. C. §252(e)(6) and 28 U. S. C. §1331 independently grant federal courts subject-matter jurisdiction to determine

whether the Commission's order requiring that Verizon pay WorldCom reciprocal compensation for ISP-bound calls violates the 1996 Act. Section 252 sets forth procedures relating to formation and commission approval of interconnection agreements, and commission approval and continuing review of interconnection terms and conditions (called "[s]tatements of generally available terms," §252(f)) filed by LECs. Section 252(e)(6) provides, in relevant part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." The determination at issue here is neither the approval or disapproval of a negotiated agreement nor the approval or disapproval of a statement of generally available terms. WorldCom, Verizon, and the United States argue, however, that a state commission's authority under §252 implicitly encompasses the authority to interpret and enforce an interconnection agreement that the commission has approved,[2] and that an interpretation or enforcement decision is therefore a "determination under [§252]" subject to federal review. Whether the text of §252(e)(6) can be so construed is a question we need not decide. For we agree with the parties' alternative contention, that even if §252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U. S. C. §1331 to review the Commission's order for compliance with

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[2] The Fourth Circuit suggested that both Maryland law and the Federal Communications Act of 1934 grant the Commission authority to interpret and enforce interconnection agreements that it approved under §252. 240 F.3d 279, 304 (CA4 2001) (citing 47 U.S.C. §152(b), and Md. Pub. Util. Cos. Code Ann. §2-113 (1998). The parties dispute whether it is in fact federal or state law that confers this authority, but no party contends that the Commission lacked jurisdiction to interpret and enforce the agreement.

federal law.

Verizon alleged in its complaint that the Commission violated the Act and the FCC ruling when it ordered payment of reciprocal compensation for ISP-bound calls. Verizon sought a declaratory judgment that the Commission's order was unlawful, and an injunction prohibiting its enforcement. We have no doubt that federal courts have jurisdiction under §1331 to entertain such a suit. Verizon seeks relief from the Commission's order "on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail," and its claim "thus presents a federal question which the federal courts have jurisdiction under 28 U. S. C. §1331 to resolve." *Shaw* v. Delta Air Lines, Inc., 463 U. S. 85, 96, n. 14 (1983).

The Commission contends that since the Act does not create a private cause of action to challenge the Commission's order, there is no jurisdiction to entertain such a suit. We need express no opinion on the premise of this argument. "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 89 (1998). As we have said, "the district court has jurisdiction if `the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' unless the claim `clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Ibid.* (citation omitted). Here, resolution of Verizon's claim turns on whether the Act, or an FCC ruling issued thereunder, precludes the Commission from ordering payment of reciprocal compensation, and there is no suggestion that Verizon's claim is "'immaterial'" or "'wholly insubstantial and frivolous.' " *Ibid.*

Verizon's claim thus falls within 28 U. S. C. §1331's general grant of jurisdiction, and contrary to the Fourth Circuit's conclusion, nothing in 47 U. S. C. §252(e)(6) purports to strip this jurisdiction. Section 252(e)(6) provides for federal review of an agreement when a state commission "makes a determination under [§252]." If this does not include (as WorldCom, Verizon, and the United States claim it does) the interpretation or enforcement of an interconnection agreement, then §252(e)(6) merely makes *some other* actions by state commissions reviewable in federal court. This is not enough to eliminate jurisdiction under §1331. Although the situation is not precisely parallel (in that here the elimination of federal district-court review would not amount to the elimination of all review), we think what we said in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967), is nonetheless apt: "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." (Internal quotation marks and citation omitted). And here there is nothing more than that mere fact. Section 252 does not establish a distinctive review mechanism for the commission actions that it covers (the mechanism is the same as §1331: district-court review), and it does not distinctively limit the substantive relief available. Cf. *United States* v. *Fausto*, 484 U. S. 439, 448-449 (1988). Indeed, it does not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action ("[A]ny party aggrieved by such determination may bring an action in an appropriate Federal district court," §252(e)(6)). Cf. *Steel Co., supra*, at 90-91 (even a statutory provision that uses the word "jurisdiction" may not relate to "subject-matter jurisdiction"); see also *Davis* v. *Passman*, 442 U. S. 228, 239, n. 18 (1979).

And finally, none of the other provisions of the Act evince any intent to preclude federal review of a commission determination. If anything, they reinforce the conclusion that §252(e)(6)'s silence on the subject leaves the jurisdictional grant of §1331 untouched. For where otherwise applicable

jurisdiction was meant to be excluded, it was excluded expressly. Section 252(e)(4) provides: "No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." In sum, nothing in the Act displays any intent to withdraw federal jurisdiction under §1331; we will not presume that the statute means what it neither says nor fairly implies.[3]

III

The Commission nonetheless contends that the Eleventh Amendment bars Verizon's claim against it and its individual commissioners. WorldCom, Verizon, and the United States counter that the Commission is subject to suit because it voluntarily participated in the regulatory regime established by the Act. Whether the Commission waived its immunity is another question we need not decide, because—as the same parties also argue—even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U. S. 123 (1908).

In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 296 (1997)

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[3] The Commission also suggests that the *Rooker-Feldman* doctrine precludes a federal district court from exercising jurisdiction over Verizon's claim. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The *Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. §1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court, see 28 U.S.C. §1257(a). The doctrine has no application to judicial review o executive action, including determinations made by a state administrative agency.

(*O'Connor*, J., joined by *Scalia* and *Thomas*, JJ., concurring in part and concurring in judgment); see also *id.*, at 298-299 (*Souter*, J., dissenting, joined by *Stevens*, *Ginsburg*, and *Breyer*, JJ.). Here Verizon sought injunctive and declaratory relief, alleging that the Commission's order requiring payment of reciprocal compensation was pre-empted by the 1996 Act and an FCC ruling. The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our "straightforward inquiry." We have approved injunction suits against state regulatory commissioners in like contexts. See, *e.g.*, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 230 (1908) ("[W]hen the rate is fixed a bill against the commission to restrain the members from enforcing it will not be bad ... as a suit against a State, and will be the proper form of remedy"); *Alabama Pub. Serv. Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 344, n. 4 (1951); *McNeill* v. *Southern R. Co.*, 202 U. S. 543 (1906); *Smyth* v. *Ames*, 169 U. S. 466 (1898); *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362 (1894). Indeed, *Ex parte Young* itself was a suit against state officials (including state utility commissioners, though only the state attorney general appealed), to enjoin enforcement of a railroad commission's order requiring a reduction in rates. 209 U. S., at 129. As for Verizon's prayer for declaratory relief: That, to be sure, seeks a declaration of the *past*, as well as the *future*, ineffectiveness of the Commission's action, so that the past financial liability of private parties may be affected. But no past liability of the State, or of any of its commissioners, is at issue. It does not impose *upon the State* "a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman* v. *Jordan*, 415 U. S. 651, 668 (1974). Insofar as the exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction.

The Fourth Circuit suggested that Verizon's claim could not be brought under *Ex parte Young*, because the Commission's order was probably *not* inconsistent with

federal law after all. 240 F. 3d, at 295-297. The court noted that the FCC ruling relied upon by Verizon does not seem to require compensation for ISP traffic; that the Court of Appeals for the D. C. Circuit has vacated the ruling; and that the Commission interpreted the interconnection agreement under state contract-law principles. It may (or may not) be true that the FCC's since-vacated ruling does not support Verizon's claim; it may (or may not) also be true that state contract law, and not federal law as Verizon contends, applies to disputes regarding the interpretation of Verizon's agreement. But the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim. See *Coeur d'Alene, supra,* at 281 ("An *allegation* of an ongoing violation of federal law ... is ordinarily sufficient" (emphasis added)).

Nor does the 1996 Act display any intent to foreclose jurisdiction under *Ex parte Young*—as we concluded the Indian Gaming Regulatory Act did in *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44 (1996). There an Indian Tribe sued the State of Florida for violating a duty to negotiate imposed under that Act, 25 U. S. C. §2710(d)(3). Congress had specified the means to enforce that duty in §2710(d)(7), a provision "intended ... not only to define, but also to limit significantly, the duty imposed by §2710(d)(3)." 517 U. S., at 74. The "intricate procedures set forth in that provision" prescribed that a court could issue an order directing the State to negotiate, that it could require the State to submit to mediation, and that it could order that the Secretary of the Interior be notified. *Id.,* at 74-75. We concluded that "this quite modest set of sanctions" displayed an intent not to provide the "more complete and more immediate relief" that would otherwise be available under *Ex parte Young*. 517 U. S., at 75. Permitting suit under *Ex parte Young* was thus inconsistent with the "detailed remedial scheme," 517 U. S., at 74—and the limited one—that Congress had prescribed to enforce the State's statutory duty to negotiate. The Commission's argument that §252(e)(6) constitutes a detailed

and exclusive remedial scheme like the one in *Seminole Tribe*, implicitly excluding *Ex parte Young* actions, is without merit. That section provides only that when state commissions make certain "determinations," an aggrieved party may bring suit in federal court to establish compliance with the requirements of §§251 and 252. Even with regard to the "determinations" that it covers, it places no restriction on the relief a court can award. And it does not even say whom the suit is to be brought against—the state commission, the individual commissioners, or the carriers benefiting from the state commission's order. The mere fact that Congress has authorized federal courts to review whether the Commission's action complies with §§251 and 252 does not without more "impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*." *Seminole Tribe, supra,* at 75-76.

* * *

We conclude that 28 U. S. C. §1331 provides a basis for jurisdiction over Verizon's claim that the Commission's order requiring reciprocal compensation for ISP-bound calls is pre-empted by federal law. We also conclude that the doctrine of *Ex parte Young* permits Verizon's suit to go forward against the state commissioners in their official capacities. We vacate the judgment of the Court of Appeals and remand these cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

535 U.S. ____ (2002)

SUPREME COURT OF THE UNITED STATES

RICHARD L. MATHIAS, et al., PETITIONERS,
v.
WORLDCOM TECHNOLOGIES, INC., et al

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEARS FOR THE SEVENTH CIRCUIT

[May 20, 2002]

Per curiam.

We granted certiorari to consider three questions: (1) whether a state commission's action relating to the enforcement of an interconnection agreement is reviewable in federal court under 47 U.S.C. 252(e)(6) (1994 ed., Supp. IV); (2) whether a state commission waives its Eleventh Amendment immunity by voluntarily participating in the regulatory scheme established by the Telecommunications Act of 1996, Publ. L. 104—104, 110 Stat. 56; and (3) whether the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), permits suit for prospective relief against state public utility commissioners in their official capacities for alleged ongoing violations of that Act. 532 U.S. 903 (2001). After full briefing and oral argument, it is now clear that petitioners were the prevailing parties below, and seek review of uncongenial findings not essential to the judgment and not binding upon them in future litigation. As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous. See *New York Telephone Co. v. Maltbie*, 291 U.S. 645 (1934) (*per curiam*).

We have since granted certiorari to the United States Court of Appeals for the Fourth Circuit to review the same

questions, arising in the same factual context. *Verison Md., Inc. v. Public Service Comm'n of Md.*, and *United States v. Public Serv. Comm'n of Md.*, 534 U.S. 1072 (2001). Our decision on those cases is released today. See *Verison Md., Inc. v. Public Serv. Comm'n of Md., ante*, p. ___. The writ in this case is dismissed as improvidently granted.

It is so ordered.

Justice O'Connor took no part in the consideration or decision of this case.

CERTIFICATION OF COUNSEL

I WARDE H. ERWIN, do hereby certify that I served the foregoing Plaintiff-appellant's Motion for Summary Judgment Determination on attorneys of record, Janet W. Schroer and Marjorie A. Speirs, counsel for defendants-respondents Oregon State Bar and its Board of Governors, and upon the office of the Attorney General (Mr. Richard D. Wasserman) for defendants-respondents State of Oregon, et al. on July 16, 2002, by mailing to said attorneys true copies thereof of said Motion certified by me as such, contained in a sealed envelope with postage paid thereon, said attorneys at each of their last known addresses, to-wit:

Janet W. Schroer and Marjorie A. Speirs
1000 Broadway, 20th Floor
Portland, Oregon 97205

and the

Office of the Attorney General
1162 Court St., NE
Salem, Oregon 97301

and deposited in the postoffice at Portland, Oregon, on said day.

Dated: July 26, 2002

/S/ Warde H. Erwin
Warde H. Erwin, 39011
In propria persona

July 25, 2002

Ms. Cathy A. Catterson
Clerk, Ninth Circuit Court of Appeals
P. 0. Box 193939
San Francisco, California 94119 1939

Dear Ms. Catterson:

Re: Erwin v. State of Oregon, et al
Motion for Summary Judgment
CA 01 35830

Enclosed are original and four copies of petitioner's Motion for Summary Judgment. It is rare that the Supreme Court of the United States determines a case whose principles are also determinative of a matter pending in your court.

However, Plaintiff-appellant sincerely believes that the Supreme court (US) case of *Verizon Maryland, Inc. v. Public Service Commission of Maryland, et al.*(decided May 20, 2002) has in fact performed that service in regard to the *Erwin v. Oregon State Bar* case referenced above.

The *Erwin* case questions the actions of the Bar in administering the Oregon State Bar Professional Liability Fund Act and in levying annual assessment against the members of the Oregon State Bar in violation of the Federal Constitution (Oregon being the only state in the United States having such a law).

The US District Court for the District of Oregon dismissed the plaintiff's case on the basis of lack of subject matter jurisdiction, and plaintiff appealed a year ago in August, 2001 to your Court.

The day following the Supreme Court determination of the *Verizon* case (may 21, 2002), 1 filed with your court as supplemental authority ority the *Verizon* case and suggested that it might well be determinative of all matters now

pending before your court being only the question of subject matter jurisdiction which was the identical matter decided by the U. S. Supreme Court in *Verizon*.

It would be of considerable urgency to have this matter determined a soon as possible because every year many members of the Bar are disenfranchised for nonpayment of assessments levied by the Fund in violation of the Federal Constitution.

For the convenience of the court, I am attaching to the motions a copy of the *Verizon* decision, and I feel now that the enclosed motion is appropriate and proper and particularly so in view of the rather unusual circumstances. opposing counsel have been served with a copy of this letter and the motion.

Thank you for your kind assistance.

Yours very truly,

Warde H. Erwin
Pro-se
OSB 39011

App. 72

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35830

WARDE H. ERWIN, Plaintiff-Appellant

v.

THROUGH THE HONORABLE JOHN KITZHABER,
Governor of the State of Oregon,
THE OREGON STATE BAR AND ITS BOARD OF
GOVERNOR
AS ITS EXECUTIVE ADMINISTRATOR,
and the UNKNOWN INSURANCE COMPANY
PROVIDING MALFEASANCE INSURANCE
for the Officers, Directors, and
Employees of the Oregon State Bar,
Defendants

PLAINTIFF-APPELLANT'S
MOTION FOR SUMMARY JUDGMENT
DETERMINATION

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Of Attorneys for the State of Oregon by
and through the Honorable John Kitzhaber
Governor of the State of Oregon

Comes now the plaintiff-appellant and moves the Court for an order reversing the Judgment of the District Court of the United States for the District of Oregon entered in the above-entitled case dismissing the case and awarding costs which said judgment was dated the 23rd day of July, 2001, and remanding to the said District Court for further proceeding in conformance with this order, and the cases of *Verizon v. Public Service Commission of Maryland*, 535 U.S. 1072 May 20, 2002 and *ex parte Young*, 309 U. S., NO. 123 (1908).

/S/ Warde H. Erwin
Warde H. Erwin, 39011 pro per

Dated: July 25, 2002

In support of this Motion, the petitioner will rely on the following facts and legal propositions.

CONCLUSIVENESS OF VERIZON

This case presents to the Ninth Circuit Court of Appeals the question of whether Federal District Courts have jurisdiction over a request for a Declaratory Judgment to determine whether the Oregon State Bar and its Board of Governors as an agency of the State of Oregon has been and is now administering the Oregon Laws (ORS 9.200) in a manner contrary to and in violation of the Constitution of the United States of America based upon the Federal Declaratory Judgment Act (Title 28, Section 2201).

The Federal District Court for the District of Oregon has determined that it does not have jurisdiction and dismissed the case without hearing.

Plaintiff-appellant, as a member of the Oregon State Bar appeals the decision to the Ninth Circuit Court of Appeals.

The plaintiff-appellant, all defendants, the members of the Ninth Circuit panel appointed to hear and determine this appeal, and all attorneys representing any party to this procedure including the Attorney General of the State of Oregon, and his employees appearing in behalf of the State of Oregon have each and all taken and subscribed a solemn oath to uphold and defend the provisions of the United States Constitution, AS WELL AS ITS LAWS.

Since the case is based on the laws and Constitution of the United States, there can be no adversity presented to this court, and it should be so noted and construed by any party in making its analysis and by the court panel.

DECISION APPEALED

The District Court's decision from which this appeal is taken states:

(Docket item 34, page six, line 23; EOR ll6, Pl's Br. page 11).

> "The defendants move to dismiss this action or in the alternative for summary judgment on the grounds that 1) this court lacks subject-matter jurisdiction because the petition of the plaintiff is barred by the grant of immunity in the Eleventh Amendment to the UNITED STATES CONSTITUTION; 2) This court lacks subject matter jurisdiction because the plaintiff's petition is barred by the Rooker-Feldman doctrine, and 3) the plaintiff's petition is barred on the grounds of issue preclusion."

VERIZON

On May 20, 2002, the case of *Verizon v. Public Service Commission of Maryland* was determined by the United States Supreme Court 535 U.S. 1072, (2002), and was forwarded to this court as supplemental additional authority with the suggestion that all matters presented and pending in this court would appear to have been settled and determined by *Verizon*.

Fifteen days later, the attorneys for the bar and its governors forwarded a letter indicating a wish to respond to *Verizon* as to the 11th amendment issue, the attorney wished to reassert the position taken in its response brief, pages 4-17.

No response has been received from the State of Oregon's attorney general.

Responding defendant's letter states that they are responding to the *Verizon* case pursuant to the authority contained in Federal Rules of Civil Procedure 28 (j) but Rule 28 (j) states:

> "The letter must state without argument the reasons for the supplemental citations referring either to the page of the brief or to a point argued orally. ANY RESPONSE MUST BE MADE PROMPTLY AND MUST BE SIMILARLY LIMITED."

Defendant's letter would appear to be entirely argumentative, and no authorities can be cited and indeed none are because the United States Supreme Court has spoken, and its decision in *Verizon* is final and binding as the law of the land, which defendants and counsel have sworn to defend.

Verizon states:

> "Indeed, it (47 U.S. C., Section 252, (e) (6) does not even mention subject matter jurisdiction but reads like the conferral of a private right of action (Any party aggrieved y such determination may bring an action in an appropriate Federal district court."

The language of the Federal Declaratory Judgment Act (Title 28, Section 2201 U.S.C.A.) is comparable. It states:

2201 CREATION OF REMEDY

a) "In a case of actual controversy within its jurisdiction l. . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and the legal relations of any party seeking such declaration. . ."

Verizon concludes, page seven:

> "Verizon's claim thus falls within 28 U.S.S.C. Section 1331's general grant of jurisdiction and contrary to the Fourth Circuit's conclusion nothing in 47 U.S.C. section 252 (c) (6) purports to strip this jurisdiction."

and pages 7-8,:

> "And finally, none of the other provisions of the Act evince any intent to preclude Federal review of a commission determination. If anything, they reinforce the conclusion that #252 (e) (6)'s silence on the subject leaves the jurisdictional grant of #1331 untouched for where otherwise applicable jurisdiction, was meant to be excluded, it was excluded expressly."

And

> "In sum, nothing in the act displays any intent to withdraw Federal jurisdiction under #1331, we will not presume that the statute means what it neither says or fairly implies." (ft.nt. 3).

and under III:

> "Whether the Commission waived its immunity is another question we need not decide, because (as the same parties argue) even absent waiver, Verizon may proceed against the individual commissioners, in their capacities, pursuant to the doctrine of *Ex Parte Young*, 209 U.S. #123 (1908)."

In determining whether the doctrine of *Ex Parte Young*, avoids eleventh amendment bar to suit, a

> court need only conduct a 'straight forward inquiry into whether the complaint alleges an ongoing violation of Federal law and seeks relief properly characterized as prospective (*Idaho v. Coer d' Alene tribe of Idaho*, 521 U. S. 261, 296 (1997)'" (pages 8-9 *Verizon*)

and pages 9-10 *Verizon*:

> Indeed, *Ex Parte Young* itself was a suit against state officials (including state utility commissioners, though only the state attorney general appealed) to enjoin enforcement of a railroad commission's order requiring a reduction in rates. 209 U.S. at 129. As for *Verizon's* prayer for declaratory relief. That to be sure seeks a declaration of the past, as well as the future, ineffectiveness of the commission's action, so that the past liability of private parties may be effected. But no past liability of the state, or any of its commissioners is at issue. It does not impose upon the state "a monetary loss resulting from a past breach of legal duty on the part of the defendant state officials" *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Insofar as the exposure of the state is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction."

See Plaintiff's opening brief, pages 12-13,

SECOND GROUND FOR DISMISSAL

> "This court lacks subject matter jurisdiction because the plaintiff's petition is barred by the Rooker-Feldman doctrine."

The district court's determination on this ground has also been put to rest by Footnote three, page eight *Verizon*. After

citing the Rooker and Feldman decisions, the opinion of the U. S. in Verizon stated:

> "The doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency."

The case of *Advance Resorts of America v. City of Wheeler*, 141 Or. App. 166, 180, 917 P.2d 61, rev. den. 324 Or 211 (1996) was followed by the case of *City of Portland v. Cook*, 170 Or 2445, 253, 12 P.3rd 70 (2000) in which the *Advance Resorts* case was cited and approved stating that declaratory judgment cases should not be dismissed where a justiciable controversy has been alleged, but must be determined by a declaration declaring the parties rights and stated:

> "Judgment dismissing claim for declaratory relief vacated and remanded with instructions to enter a judgment declaring the parties' rights."

The Rooker-Feldman doctrine merely provides that a direct appeal from a state court judgment may not be taken to a Federal district court, but must be taken to the U.S. Supreme Court for review.

Here, there is no appeal. The State Court judgment was a nullity and did not contain a declaration as required by State Law nor did it contain finding of fact or law and totally ignored the effect of ORS Chapter 752 as having impliedly repealed the statutes under which the Bar was administering the Oregon Statutes of ORS 9.080 and 9.200.

The case before this court was brought under a Federal Statute for a declaration of the status of the members of the Oregon State Bar in relation to the Bar's administration of state statutes in violation of the *United States Constitution* and

is in no way an appeal from a state court judgment. As stated in *Verizon*:

> "The doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency." (Page 8).

THE THIRD GROUND FOR DISMISSAL

The third ground stated by the Federal District court upon which it relied for its judgment of dismissal stated:

"The plaintiff's petition is barred on the grounds of issue preclusion."

There obviously can be no preclusion unless there was an issue which has been determined by another judicial tribunal after a full fair and complete hearing of thee precise issue presented to this court by plaintiff's complaint.

No issue was to defendants' violation of the *U.S. Constitution* was presented to, heard by, or determined by a judgment of any court or judicial authority at any time.

As stated in *Gast v. State ex rel Stevenson*, 36 Or Or App 441, 586 P.2ad 12 (1978):

> "Sovereign immunity does not apply to suits in which only relief prayed for is declaration that state statute violates the supremacy clause of the U. S. Constitution because the relief sought is not against

the state as sovereign, but to prevent government officials from engaging in ultra vires acts. Const. Article V., #24; United States Constitution, Article VI, C1.2.

Respectfully submitted,

/S/ Warde H. Erwin
Warde H. Erwin
Pro per
OSB 39011

Dated: July 25, 2002

FILED
Jul 30, 2002
Cathy A. Catterson
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 01-35830
D.C. No. CV-01-00177-FR

WARDE H. ERWIN, Plaintiff-Appellant,

v.

STATE OF OREGON; et al., Defendants-Appellees.

MEMORANDUM[***]

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Submitted July 22. 2002[****]

[***] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Circuit Rule 36-3.

[****] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, we deny Erwin's "Motion re Oral Argument."

Before: BROWNING, KOZINSKI, and BERZON, Circuit Judges.

Oregon attorney Warde H. Erwin appeals pro se the district court's judgment dismissing his action alleging that Oregon's mandatory professional liability coverage for state bar members in private practice is unconstitutional. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's dismissal, *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1990), and we affirm.

The district court properly dismissed the action because the principle of res judicata barred Erwin's attempt to relitigate claims resolved against Erwin in the Oregon courts. *See Red Fox v. Red Fox*, 564 F.2d 361, 363 (9th Cir. 1977); *see also Troutman v. Erlandson*, 598 P.2d 1211, 1219 (Or. 1979).

Erwin's contentions regarding a "manufactured theory" between the district court and defendants, and the existence of a "justiciable controversy" are unpersuasive.

AFFIRMED.